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THE
ONTARIO LAW REPORTS

CASES DETERMINED IN THE SUPREME COURT
OF ONTARIO (APPELLATE AND HIGH
COURT DIVISIONS).

1916

6017

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JUDGES

OF THE

SUPREME COURT OF ONTARIO

DURING THE PERIOD OF THESE REPORTS.

APPELLATE DIVISION.

First Divisional Court.

THE HON. SIR WILLIAM RALPH MEREDITH, C.J.O.

“ “ JAMES THOMPSON GARROW, J.A.*

“ “ JOHN JAMES MACLAREN, J.A.

“ “ JAMES MAGEE, J.A.

“ “ FRANK EGERTON HODGINS, J.A.

Second Divisional Court.

THE HON. RICHARD MARTIN MEREDITH, C.J.C.P.

“ “ WILLIAM RENWICK RIDDELL, J.

“ “ HAUGHTON LENNOX, J.

“ “ JAMES LEITCH, J.

“ “ CORNELIUS ARTHUR MASTEN, J.

HIGH COURT DIVISION.

THE HON. SIR JOHN ALEXANDER BOYD, K.C.M.G., C.

“ “ SIR GLENHOLME FALCONBRIDGE, C.J.K.B.

“ “ SIR WILLIAM MULOCK, K.C.M.G., C.J.Ex.

“ “ BYRON MOFFATT BRITTON, J.

“ “ ROGER CONGER CLUTE, J.

“ “ FRANCIS ROBERT LATCHFORD, J.

“ “ ROBERT FRANKLIN SUTHERLAND, J.

“ “ WILLIAM EDWARD MIDDLETON, J.

“ “ HUGH THOMAS KELLY, J.

* Mr. Justice GARROW died on the 31st August, 1916.

ERRATA ET ADDENDA.

- Page 2, 13th line from top, for "408" read "406."
- " 78, 11th line from top, for "8 O.L.R. 401" read "8 O.L.R. 391."
- " 83, 13th line from top, delete "[1914] 3 K.B. 1020."
- " 158, 11th line from top, for "270" read "271."
- " 263, 14th line from top, for "as" read "at."
- " 301, in 1st line of head-note and on 9th line from bottom of page,
for "34 O.L.R. 63" read "34 O.L.R. 632."
- " 338, 9th line from top, for "defendant" read "plaintiff."
- " 341, 10th line from top, for "affect" read "offset."
- " 355, 17th line from bottom, for "Jarman on Wills" read "Lewin on
Trusts."
- " 378, add to the foot-note a reference to 7 & 8 Edw. VII. ch. 71, sec. 3,
amending sec. 136 of the Canada Temperance Act, R.S.C.
1906, ch. 152.
- " 458, last line of head-note, for "269" read "629."

APPENDIX.

Ontario cases decided on appeal to the Supreme Court of Canada* and reported since the publication of volume 35 of the Ontario Law Reports:—

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*No decisions of the Judicial Committee have been reported in the Appeal Cases since the publication of vol. 35 O.L.R.

MEMORANDA

CALL TO THE BAR

15TH JUNE, 1916.

- Miss Gertrude Alford, Charles Allen Snowdon, Charles Bagot Labatt.

14TH SEPTEMBER, 1916.

Albert Grenville Davis, Morley Calvin Pritchard, Francis Harvey Snyder, Malcolm Angus McKay, William Edward Vincent Goodwin, Daniel Walker Markham, Charles Bennett McClurg, Allan Archibald Bain, James Edmund McGlade, Henri Saint Jacques, David Henry Stewart, Frederick Percy Varcoe, Charles Edgar Lafayette Babcock, James Brydges Keeler, Craig Allan St. Clair McKay, Albert Aubin, Lester Millman Keachie, William James Thompson, Daniel Patrick James Kelly, Ernest Albert Harris, Robert Everett Grass, Melville William Wilson, Edward Henry Brower, James Andrew Thomas.

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REPORTS OF CASES

DETERMINED IN THE

SUPREME COURT OF ONTARIO

(APPELLATE AND HIGH COURT DIVISIONS).

[IN CHAMBERS.]

REX v. LEITCH.

1916

Feb. 15.

Liquor License Act—Offence against sec. 141 of R.S.O. 1914, ch. 215—Person Found Intoxicated in Local Option Municipality—"Public Place"—Amending Act, 5 Geo. V. ch. 39, sec. 33—Blacksmith's Forge—Magistrate's Conviction.

A "public place" is one where the public go, no matter whether they have a right to go or not.

Regina v. Wellard (1884), 14 Q.B.D. 63, followed.

A blacksmith's forge was *held* to be a "public place," within the meaning of clause (a) of sec. 141 of the Liquor License Act, R.S.O. 1914, ch. 215, as added by 5 Geo. V. ch. 39, sec. 33; and a motion to quash a magistrate's conviction of a person for being found in an intoxicated condition in a forge situated in a municipality in which a local option by-law was in force, was refused.

Rex v. Cook (1912), 27 O.L.R. 406, distinguished as having been decided before the amendment of the statute.

MOTION to quash the conviction of the defendant by a magistrate for an offence against sec. 141 of the Liquor License Act, R.S.O. 1914, ch. 215, which is in part as follows: "Where in a municipality in which a local option by-law is in force or in which no tavern or shop license is issued, a person is found upon a street or in any public place in an intoxicated condition . . . he shall be guilty of an offence against this Act." By clause (a), added by 5 Geo. V. ch. 39, sec. 33, "public place" includes "any place, building or public conveyance to which the public habitually resort or to which the general public are admitted either free or upon payment," etc.

February 15. The motion was heard by BOYD, C., in Chambers.

James Haverson, K.C., for the defendant.

J. R. Cartwright, K.C., for the Attorney-General.

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BOYD, C. (on the same day):—There is some evidence that Leitch was seen in an intoxicated condition in Morris's blacksmith-shop, in the village of Newburg, and was committing an offence against the provisions of sec. 141 of the Liquor License Act.

The offence must be in some public place, and that is defined by the Act of 5 Geo. V. ch. 39, sec. 33, as any place to which the public habitually resort. One may take judicial notice that in the ordinary country village the forge of the village blacksmith is a place of popular resort when work is going on. Several people were congregated in this shop on the day in question, talking about horses and races and so passing the time. The amendment of the Act was subsequent to the case of *Rex v. Cook* (1912), 27 O.L.R. 408, decided by my brother Kelly, who construed the old section as controlled by the word "street," and held that it did not extend to a place where, as a hotel, persons are permitted to go for accommodation such as a hotel affords.

"Public place" is a fluctuating term, and the meaning varies with the context, but as a general thing the words of Grove, J., in *Regina v. Wellard* (1884), 14 Q.B.D. 63, are suggestive: "A public place is one where the public go, no matter whether they have a right to go or not."

I am not disposed to disturb the magistrate's finding; and the application is dismissed with costs.

[IN CHAMBERS.]

1916
 Feb. 16.

REX v. ARMSTRONG.

Liquor License Act—Offence against sec. 78—Attempting to Tamper with Witnesses on Prosecution under Act—Powers of Provincial Legislature—Validation of ultra Vires Enactment by Dominion Legislation—Canada Temperance Act, R.S.C. 1906, ch. 152, sec. 150—Want of Certainty in Informations and Convictions—Convictions by two Justices—Adjudication by one only—Jurisdiction—Attempt to Tamper before Prosecution Initiated—"On any Prosecution"—Motion to quash Convictions—Costs.

Section 78 of the Liquor License Act, R.S.O. 1914, ch. 215, is in effect validated by sec. 150 of the Canada Temperance Act, R.S.C. 1906, ch. 152; under the combined legislation of the Province and the Dominion, magistrates have jurisdiction in a summary way to convict for the offence of attempting to tamper with a witness on a prosecution under the Liquor License Act.

Regina v. Lawrence (1878), 43 U.C.R. 164, in which case it was decided that the original of sec. 78 was *ultra vires*, distinguished.

Neither the informations nor the convictions stated in what way the witnesses were asked to swear falsely; but it was *held*, that there was no want of certainty, the words of the statute being followed, and there being no misapprehension of what was involved.

Regina v. Lawrence, *supra*, followed upon this point.

The convictions purported to be made by two Justices of the Peace. The hearing was before the two; judgment was reserved; and the result was announced in open court by one Justice only, reasons in writing being signed by both:—

Held, that no want of jurisdiction appeared upon these facts.

Judgment of Gregory, J., in *Rex v. Haines* (1908), 39 N.B.R. 49, not followed; opinion of BARKER, C.J., in the same case at p. 51, approved.

One of the convictions was quashed (but without costs), upon the ground that the attempt to tamper appeared to have been made before the prosecution for the earlier offence was commenced.

Ex p. White (1890), 30 N.B.R. 12, and *Regina v. LeBlanc* (1885), 8 Legal News (Montreal) 114, followed.

The other conviction was affirmed with costs.

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MOTION to quash two convictions of the defendant made by two Justices of the Peace, under sec. 78 of the Liquor License Act, R.S.O. 1914, ch. 215, for attempting to tamper with two witnesses upon a prosecution of the defendant for keeping intoxicating liquor for sale without a license, in violation of the provisions of that Act.

February 15. The motion was heard by Boyd, C., in Chambers.

G. H. Kilmer, K.C., for the defendant.

J. R. Cartwright, K.C., for the Attorney-General.

February 16. BOYD, C.:—On the 26th January, 1916, an information was laid against Armstrong for keeping liquor for sale without a license, and he was served with a summons on the 27th January. The matter was duly prosecuted before two Justices of the Peace, Gibson and Ballachey; and McArthur and Hyde were examined as witnesses for the prosecution. The attempt made by Armstrong to induce McArthur to misstate facts was in a conversation on the 25th January, and the magistrates find it was on that day—which was a day before the information was laid. The objection was taken at the close of the evidence that no prosecution was pending at the time of the alleged offence.

The case against Armstrong for illegal sale was dismissed, but he was convicted, under sec. 78 of the Liquor License Act, R.S.O. 1914, ch. 215, of attempting to tamper with the witness Hyde and with the witness McArthur.

The motion is now made to quash these convictions, upon the following grounds:—

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(1) That no offence is stated, as the conviction does not state, nor does the information, in what way the witness was asked to swear falsely.

(2) That sec. 78 is *ultra vires* of the Ontario Legislature, and the magistrates had no jurisdiction.

(3) That the case was heard by two magistrates, and that the adjudication was made by one in the court-room on the day of adjournment, in the absence of the other.

These objections are common to both convictions, but as to the conviction in the case of the witness McArthur there is the further objection that the alleged offence occurred before there was any prosecution.

The main matter discussed was as to the jurisdiction of the Justices under the Liquor License Act.

The law to-day is the same in our statute-book as it was in R.S.O. 1877, ch. 181, sec. 57. That enacts that "any person who, on any prosecution under this Act, tampers with a witness, either before or after he is summoned or appears as such witness on any trial or proceeding under this Act, or by the offer of money, or by threats, or in any other way, either directly or indirectly, induces or attempts to induce any such person to absent himself, or to swear falsely, shall be liable to a penalty of \$50 for each offence." That section was passed upon by the Court in 1878, and was regarded as being beyond the powers of the Provincial Legislature: it had to do with the crime of subornation of perjury, and that was a crime already dealt with in the Criminal Code of Canada: *Regina v. Lawrence* (1878), 43 U.C.R. 164. Notwithstanding this judicial condemnation, the provision in identical terms was continued in R.S.O. 1887, ch. 194, sec. 84; R.S.O. 1897, ch. 245, sec. 85; and down to date in R.S.O. 1914, ch. 215, sec. 78.

Perhaps some explanation of the continuance of the enactment may be found in concurrent temperance legislation of the Dominion. In 1878, the Canada Temperance Act was passed, and had some special provisions relating to the local liquor laws of the Provinces, and among the rest this, as sec. 114: "Any person who, on any prosecution under any of the said Acts, tampers with a witness, either before or after he is summoned or appears as such witness on any trial or proceeding under any such Act, or by the offer of money, or by threats, or in any other way, either directly

or indirectly, induces or attempts to induce any such person to absent himself, or to swear falsely, shall be liable to a penalty of \$50 for each offence:" 41 Vict. ch. 16, sec. 114 (Dom.) This provision, in the same words, appears in the Canada Temperance Act in the last revision of the Dominion statutes in 1906, ch. 152, sec. 150.

The magistrates regarded sec. 78 of the Liquor License Act as validated by the Canada Temperance Act, and this appears to be the practical outcome of this somewhat unusual legislation. The magistrates had jurisdiction in a summary way under the combined legislation of the Province and the Dominion. The Dominion has chosen to legislate in a special way as to offences under the Temperance Act, and to extend its prohibition to the Provinces in regard to the tampering with witnesses in liquor cases. The provisions as to subornation of perjury are more stringent under the Criminal Code, but that is no reason why both may not stand together: *Regina v. Gibson* (1896), 29 N.S.R. 88, where Graham, E.J., said (p. 89): "I think there was a reason for dealing in a summary way * * * with the offence of tampering with witnesses summoned in the prosecutions before Justices of the Peace, under the Canada Temperance Act." He refers to the need for prompt steps being taken and in an expeditious way in order to repress dangers likely to result from an easy conscience in these liquor prosecutions. This affords another example of the conjoint legislation of Ontario and Canada, in order to secure the efficient operation of the two, relating to temperance—a subject I had occasion to consider as to Sunday legislation in *Kerley v. London and Lake Erie Transportation Co.* (1912), 26 O.L.R. 588, 594.

On this ground the convictions are immune from attack.

There is nothing in the first point as to want of certainty in the information and conviction. The words of the statute are followed—there was no misapprehension of what was involved, and the case cited for the applicant, *Regina v. Lawrence*, disposes of it.

The next objection is, that judgment was given by one Justice and the other absent. There is no merit in this. The affidavit of Armstrong shews that he was first tried for breach of the Liquor License Act, and after that came the trial upon the charges of

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tampering with witnesses; this was on the 27th January; judgment was reserved in all until the 2nd February, when Magistrate Gibson was sick, but the Court was opened in Gibson's office by the other magistrate, who announced that the charge of keeping liquor was dismissed, and thereafter he announced that Armstrong was found guilty on the other charges. It appears from the papers that the magistrates had conferred and come to a conclusion, giving reasons in writing signed by both, that the defendant was guilty; and had signed, both of them, the actual conviction dated on the 31st January, Monday. The delivery of judgment, *i.e.*, the announcement of the result, was on Wednesday. The action of the magistrates was determined both for the dismissal of the one charge and the guilt on the others on the 29th, and the mere accident of Gibson's illness and inability to attend did not frustrate the action of the other in announcing the acquittal on the one head and the guilt on the other on the same occasion. The return of all the papers on this motion is certified to by both Justices.

The only colour for this objection is the judgment of Gregory, J., in *Rex v. Haines* (1908), 39 N.B.R. 49, where he thinks that both Justices must be personally present at the oral delivery of judgment; but the opinion of Barker, C.J., at p. 51, commends itself as good sense and good law; he says: "If two Justices have met and considered their judgment together and have both signed the judgment, I should not think there was any impropriety in one reading the judgment alone." This objection is overruled, and the conviction as to the witness Hyde stands affirmed with costs.

There remains the point raised as to the witness McArthur. The offence is defined thus: "Every one who, *on any prosecution* under this Act, tampers," etc. It is a special statutory offence which contemplates that the prosecution has begun. It does not say "before" or "in view of" a prosecution, but "on" it, as an existing proceeding. Allen, C.J., in *Ex p. White* (1890), 30 N.B.R. 12, says (on a section in *pari materia* with the one in hand): "The tampering with a witness after the commencement of a prosecution, either before or after he is summoned as a witness, or appears as such, is a violation of the 121st section of the Canada Temperance Act" (p. 14). And Mr. Justice Ramsay, in a careful judgment on a cognate offence, embracery, says it is essential to the existence of

the offence that there should be a judicial proceeding pending at the time that the offence is alleged to have been committed: *Regina v. Le Blanc* (1885), 8 Legal News (Montreal) 114.

I think this conviction must be quashed, but I give no costs, as all the other grounds fail, and the witness was tampered with.

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REX v. POLLOCK.

Criminal Law—Disposing of Trading Stamps—Criminal Code, secs. 335 (u), 505—Voting Contest for Prize—Ticket Given to Purchaser of Goods—“Premium.”

The giving of a ticket by a merchant or dealer in goods to a purchaser of goods, which ticket gives the purchaser a right to contest for, and to aid himself in a voting contest for, a prize, or to aid some one else in that contest, and also to sell his rights under the ticket, is the giving of a “premium” within the meaning of sec. 335 (u) of the Criminal Code, defining “trading stamps;” and it was held, that the accused was properly convicted under sec. 505 for giving or disposing of tickets of the kind described to a merchant or dealer in goods for use in his business.

CASE stated by the Senior Judge of the County Court of the County of York, as follows:

“Henry R. Pollock was tried before me without a jury in the County Court Judge’s Criminal Court for the County of York, with his own consent, on the 8th day of December, A.D. 1915, at the city of Toronto, in the county of York, under the provisions of Part XVIII. of the Criminal Code. The charge against him was “that he did, directly or indirectly, issue, give, sell, or otherwise dispose of trading stamps to one Montgomery and others, being merchants or dealers in goods, for use in their business, contrary to the Criminal Code.”

“The Crown contended that the system of distributing prizes and issuing voting tickets constituted a violation of the provisions of the Criminal Code relating to trading stamps.

“Sections 505 and 506 of the Criminal Code are as follows:—

“Section 505: ‘Every one is guilty of an indictable offence and liable to one year’s imprisonment, and to a fine not exceeding five hundred dollars, who, by himself or his employee or agent, directly or indirectly, issues, gives, sells or otherwise disposes of, or offers

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to issue, give, sell or otherwise dispose of, trading stamps to a merchant or dealer in goods for use in his business.'

"Section 506: 'Every one is guilty of an indictable offence and liable to six months' imprisonment, and to a fine not exceeding two hundred dollars, who, being a merchant or dealer in goods, by himself or his employee or agent, directly or indirectly, gives or in any way disposes of, or offers to give or in any way dispose of, trading stamps to a purchaser from him of any such goods.'

"Under sec. 335 (u), 'trading stamps' are defined as follows:—

" 'Trading stamps' includes, besides trading stamps commonly so-called, any form of cash receipt, receipt, coupon, premium ticket, or other device, designed or intended to be given to the purchaser of goods by the vendor thereof or his employee or agent, and to represent a discount on the price of such goods or a *premium to the purchaser* thereof, which is redeemable either

" '(i.) by any person other than the vendor, or the person from whom he purchased the goods, or the manufacturer of the goods, or

" '(ii.) by the vendors, or the person from whom he purchased the goods, or the manufacturer of the goods, in cash or goods not his property, or not his exclusive property, or

" '(iii.) by the vendor elsewhere than in the premises where such goods are purchased;

" 'or which does not shew upon its face the place of its delivery and the merchantable value thereof, or is not redeemable at any time.'

"The defence contended that this was a voting contest or competition, and that the voting ticket in question did not represent either a discount or premium on the prices of the goods purchased, and was lacking in the elements necessary to constitute it a trading stamp, under the clauses above set out.

"I found the accused 'guilty' as charged, and, at the request of counsel for the accused, I have reserved the question as to whether there was any evidence upon which I could properly convict the accused upon the charge set out.

"I have made the charge-sheet and depositions a part of the case."

The scheme of the voting contest in which the voting certificates declared to be trading stamps were used, was outlined by

C. H. Montgomery, one of the witnesses. He carried on a candy business at 1226 Bloor street west. He said that, at the instance of Pollock, of the "Business Boosters," he had become a member of "the Bloor and Lansdowne Voting Contest." He bought a prize from Pollock, and placed it in his window for competition. He was supplied with a number of voting certificates, some of which represented ten votes, some twenty, and so on. He was to give a vote with every one cent purchase made in his store, and the votes were to be given to the credit of every person who entered the contest as a contestant. A person other than a purchaser might become a contestant. The votes purchased at his store would not be good at any other store. There were twenty stores in the contest, and there were twenty-two prizes. All the stores were operating in the sale of these certificates. The competition was to continue for six months, and the lucky leader of the poll would be the person who at the end of the six months would have the most votes purchased in all the stores, and could pick whichever prize he liked in any of the stores, whether he had purchased anything in that store or not. All customers did not become contestants, though it was their privilege to do so. About thirty per cent. did. To become a contestant a person had to give in his name. The votes were not redeemable for the purchase of goods. They did not entitle the purchaser to a reduction in the price of an article purchased; nor did they give a purchaser a premium that he could apply on a purchase.

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February 16. The case was heard by MEREDITH, C.J.C.P., MAGEE, J.A., RIDDELL, LENNOX, and MASTEN, JJ.

H. H. Dewart, K.C., for the defendant, said that the neat question involved in the appeal was, whether the giving of the ticket was the giving of a premium within the meaning of the Criminal Code. He argued that the scheme of the defendant was merely a voting contest, and that the voting ticket which was given to purchasers of goods was not in any sense a trading stamp, as it lacked the essential elements of one. It did not represent either a discount on the price of the goods purchased, or a premium to the purchaser. Under sec. 335 (u) of the Code, it would have to be either one or the other to constitute it a trading stamp. He contended, further, that the premium or discount must be ascertainable, which was not the case here. Also, to be a trading stamp,

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the ticket must be redeemable. These tickets were not redeemable.

Edward Bayly, K.C., for the Crown, was not called upon.

The judgment of the Court was delivered by MEREDITH, C.J. C.P.:—Mr. Dewart has placed this case very fairly before us. He has said—and I agree with him in that—that the whole question involved is: whether the giving of the ticket in question was the giving of a “premium,” within the meaning of the section of the Criminal Code under which the defendant stands convicted.

The person to whom the ticket was given was a purchaser of goods: and it was given to him as such, and to be of some advantage to him. It was not given to him as something that was worthless. Now, was it of any such advantage? If so, it was a “premium.” Obviously it must have been considered by both parties to the transaction as such; and obviously, too, it was, because it gave to the buyer a right to contest for, and to aid himself in the contest for, a prize, or to aid some one else in that contest, and also to sell his rights under the ticket.

The case is well within both the letter and the spirit of the enactment upon which the conviction is based.

The ruling of the learned trial Judge was right. The conviction must be confirmed.

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[APPELLATE DIVISION.]

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Nuisance—Noxious Trade—Injury to Neighbour—Odours, Smoke, and Noise—Findings of Fact of Trial Judge—Evidence—Appeal—Injunction—Form of Judgment—Municipal Permit—Effect of—Municipal Act, R.S.O. 1914, ch. 192, sec. 409 (2).

It was found by SUTHERLAND, J., the trial Judge, that the carrying on of the defendant's business of a blacksmith upon a lot fronting on a city street was a nuisance to the plaintiff, as owner and occupier of an adjoining lot and of his house upon it; and that the defendant's business was carried on by him in the usual and in a proper manner; and by the judgment of the trial Judge the defendant was enjoined from so operating his blacksmith-shop as to cause a nuisance to the plaintiff by reason of the offensive odours, smoke, and noise complained of:—

Held, by a Divisional Court, upon appeal, that the findings of fact could not, upon the evidence, be disturbed; but that the judgment should be varied so as to restrain the defendant from operating his blacksmith-shop

in the manner hitherto pursued by him or in any other manner so as to cause a nuisance to the plaintiff by reason of the offensive odours, smoke, or noise.

Held, also, that the permission given by the municipal authority to the defendant to erect a blacksmith-shop upon his lot did not authorise him to commit a nuisance thereon.

Scope and meaning of sec. 409 (2) of the Municipal Act, R.S.O. 1914, ch. 192.

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ACTION for damages and an injunction in respect of what the plaintiff alleged to be a nuisance—the carrying on by the defendant of the trade of a blacksmith upon premises adjoining the premises occupied by the plaintiff and his family as a dwelling-house, in Boston avenue, in the city of Toronto.

The action was tried by SUTHERLAND, J., without a jury, at Toronto.

J. H. Barton, for the plaintiff.

H. A. Newman, for the defendant.

November 20, 1915. SUTHERLAND, J.:—The plaintiff is the owner of lot No. 49 on the east side of Boston avenue, in the city of Toronto, plan No. 351 E., having derived title from the Dovercourt Land Building and Savings Company Limited, by indenture dated the 14th August, 1911. It contains the following restrictions: "And the said party of the second part, for himself, his heirs, executors, administrators, and assigns, hereby covenants and agrees with the said party of the first part, its successors and assigns, that he, the said party of the second part, will not erect or suffer to be erected any slaughter-house upon the said lands or any part thereof, and will not carry on or permit to be carried on upon the said lands, or any part thereof, any trade, business, or manufacture that shall be deemed a nuisance, and also that if any such trade, business, or manufacture be so carried on, or if the said lands and premises, or any part thereof, be put to any such use or purpose as aforesaid, he shall immediately discontinue and abate the same on being required so to do by the said party of the first part, its successors or assigns, and also that neither he nor they will remove any sand from the said property."

By deed dated the 14th November, 1911, the company conveyed lot No. 50, adjoining, to Mary and Grace Fox, a similar restriction being included therein.

By deed dated the 23rd April, 1915, Mary and Grace Fox

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conveyed lot No. 50 to Robert Glenn and Mary Eliza Glenn, without the said restrictive clause being included therein.

Glenn is a blacksmith. A proposed extension of Wilton avenue will have for its southerly limit the northerly limit of Glenn's lot. Lots 49 and 50 have their frontage on the east side of Boston avenue, which runs north and south. The easterly side of Boston avenue has dwelling-houses erected upon it, and along the westerly side are rear limits of factory and coal-chute sites, the factories and chutes fronting on Carlaw avenue, which is the next street west of Boston avenue. To the west of Glenn's lot, and to the north of the proposed extension of Wilton avenue, there are also factories. Pape avenue is the next street east of Boston avenue, and there are dwelling-houses upon both sides of it. There are some stores and shops not very far from lots 49 and 50.

The locality has been for years to some extent a factory locality, and is becoming increasingly so. When Glenn bought from the Foxes, they were aware that he wanted the site to erect a blacksmith-shop upon and ply that calling therein. Before selling, they required him to apply to the city authorities and secure a permit to erect a one-storey, solid brick, blacksmith-shop. Petitions for and against the granting of the permit were apparently filed with the committee on property of the city council, and persons interested pro and con were heard by its members.

On the 9th March, 1915, a permit was granted in these terms: "Acting upon the favourable report of the City Architect and the Chief of the Fire Department, it is recommended that the application of Mr. Glenn be granted, on condition that the building is erected in compliance with the provisions of by-law No. 6401, and that the forge is installed to the satisfaction of the Fire and Building Departments." Glenn thereupon erected his blacksmith-shop, which has doors opening east and west, those on the west side being not more than 12 or 15 feet away from the rear of the plaintiff's residence erected on lot 49. There can be no doubt that there is a great deal of noise in the locality from the factories situated therein, and considerable smoke as well.

Upon the evidence it appears that the blacksmith-shop is well constructed, that the defendant works at his occupation therein for reasonable hours, usually not after five or six o'clock, but at odd times as late as eight or nine in the evening, and that he per-

forms his work, which is mainly shoeing horses, although occasionally he also sets tires on waggons and does other work of that kind, in a usual and reasonable fashion.

The plaintiff had erected his residence some time before the blacksmith-shop was built. He actively opposed the granting of a permit to erect it. He says that the defendant bought lot No. 50 with the knowledge of the existence of the restrictions hereinbefore referred to. He also says that in the operation of the blacksmith-shop the defendant is committing a nuisance, in that "large volumes of smoke and disagreeable odour and noise issue from the shop, and make it impossible for the plaintiff and his family to enjoy his property."

The specific complaints are, that the clanging of the hammer on the anvil is very loud and persistent throughout the day, and that the smoke from the premises and the odours from the singed hoofs of the horses and from tires being set, are so disagreeable and offensive as to compel the plaintiff to keep his doors and windows closed even in very warm weather. Evidence of neighbours living in houses on Boston avenue, to the south, and in houses on Pape avenue, to the east, was of a conflicting character.

If the defendant has caused a nuisance to the plaintiff, it is of course no defence to say that he is making a reasonable use of his premises in the carrying on of a lawful occupation. The permit from the city authorities to erect the blacksmith-shop in the manner indicated would not carry with it the authority to commit a nuisance in the exercise of the right thereby granted. The duty of the defendant to his neighbour was to abstain from causing any nuisance to him. Mere smoke or offensive odour may be a sufficient ground for the interference of the Court; but it will not, as a rule, interfere by injunction if the damage is slight or the nuisance is merely of a temporary or occasional character.

In the present case of course it is the intention of the defendant, unless restrained, to continue carrying on his business as heretofore.

In *Attorney-General v. Cole & Son*, [1901] 1 Ch. 205, at p. 206, Kekewich, J., discusses the principle to be applied: "Really and truly it all comes to this, that the defendant is carrying on a lawful trade; reasonably carrying it on in a place which may fairly be devoted to that particular class of trade; and carrying

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it on in such a way that no man can say that he is guilty of extravagance in the manner in which he is conducting his business. That point has been raised again and again in different forms, and we have in many of the cases the contrast pointed out between Belgrave Square and Bermondsey, and other contrasts of a like character, and statements have been made again and again to the effect that what is a nuisance in one place is not necessarily a nuisance in another. But the truth is that that does not carry us far, because you are brought back after all to the question, Is what is complained of a nuisance? And if it really is a nuisance, then it seems almost to follow as a matter of course that it is a nuisance which ought to be restrained, assuming that it is not of a trifling or a passing character."

And in *Appleby v. Erie Tobacco Co.* (1910), 22 O.L.R. 533, at p. 536, Middleton, J., in delivering the judgment of the Divisional Court, said: "It is to be borne in mind that an arbitrary standard cannot be set up which is applicable to all localities. There is a local standard applicable in each particular district, but, though the local standard may be higher in some districts than in others, yet the question in each case ultimately reduces itself to the fact of nuisance or no nuisance, having regard to all the surrounding circumstances." And again (p. 538): "The odours do cause material discomfort and annoyance and render the plaintiff's premises less fit for the ordinary purposes of life, even making all possible allowances for the local standard of the neighbourhood."

Upon the evidence in this case, I am obliged to come to the conclusion that the noise, smoke, and odours from the premises of the defendant, which are complained of by the plaintiff, "do cause material discomfort and annoyance and render the plaintiff's premises less fit for the ordinary purposes of life, even making all possible allowances for the local standard of the neighbourhood."

Reference to Kerr on Injunctions, 5th ed. (1914), pp. 154, 155, 200, 203, and 207; *Ball v. Ray* (1873), L.R. 8 Ch. 467; *Pwllbach Colliery Co. Limited v. Woodman*, [1915] A.C. 634, at pp. 638 and 641.

An injunction will therefore go restraining the defendant from so operating his blacksmith-shop as to cause a nuisance to

the plaintiff by reason of the offensive odours, smoke, and noise complained of. I do not think that the damages thus far sustained can be said to be of a very substantial character, and I allow the sum of \$25 in that connection, as also the costs of the suit, to the plaintiff.

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The defendant has a counterclaim for damages alleged to have been suffered by him in connection with his business owing to boycotting on the part of the plaintiff. I am not able to see that any claim for damages in this respect has been successfully made out or can be allowed. The counterclaim is, therefore, dismissed without costs.

The defendant appealed from the judgment of SUTHERLAND, J.

February 2. The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and MASTEN, JJ.

W. N. Tilley, K.C., and *H. A. Newman*, for the appellant. The learned trial Judge erred in finding that the blacksmith-shop was a nuisance. The appellant was making a reasonable use of his premises in carrying on a lawful trade. While the block in which the shop was situate was residential, yet the district was a manufacturing one. There is no by-law against locating a blacksmith-shop where this one is, and in fact a permit was obtained from the municipal authorities sanctioning the location of the shop. See the Municipal Act, R.S.O. 1914, ch. 192, sec. 409 (2).

T. H. Barton, for the plaintiff, respondent. The district was not a factory one. The blacksmith-shop was a nuisance in a residential locality such as this one, owing to the smoke, odours, and noise. While the municipal permit might estop the municipal authorities from proceeding against the defendant, it was no defence to the present action. Nor was the fact that the defendant was carrying on his business in a proper manner of any moment, once it was established, as here, that the business was a nuisance: *Appleby v. Erie Tobacco Co.*, 22 O.L.R. 533; *Adams v. Ursell*, [1913] 1 Ch. 269; *Rushmer v. Polsue & Alfieri Limited*, [1906] 1 Ch. 234; *Crump v. Lambert* (1867), L.R. 3 Eq. 409; *St. Margaret's Church v. Stephens* (1898), 29 O.R. 185; *Drysdale v. Dugas* (1896), 23 S.C.R. 20; *Bornett v. Ostler File*

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Co. (1914), 7 O.W.N. 474; *Gagnon v. Dominion Stamping Co.* (1914), 7 O.W.N. 530. The defendant purchased the premises with knowledge of the restrictive covenants.

Tilley, in reply.

February 18. MEREDITH, C.J.C.P.:—The learned trial Judge has found that the carrying on of the defendant's business of a blacksmith is a nuisance to the plaintiff, as owner and occupier of an adjoining lot and of his house upon it: and he has also found that the defendant's business is carried on by him in the usual, and in a proper, manner: the logical result of these two findings is, that the defendant cannot carry on his business where it is carried on: but the inconsequential form of the judgment is, that the defendant be enjoined from carrying on his business, where it is carried on, only so as to be a nuisance to the plaintiff; the formal result being substantially only "as you were." What is to happen if the business be carried on and there should be an application to commit for contempt of the injunction? Is there any escape from a trial over again of the question whether the defendant is in fact, at the time of such application, carrying on the business so as to be a nuisance to his neighbour, the plaintiff?

What then should be done? Clearly something to define more clearly the rights and position of the parties.

The evidence sustains the findings in both respects; they cannot be disturbed here. The result then is, that the carrying on of the defendant's business, even in an ordinary, careful and proper manner, cannot be continued there. The business ought to go elsewhere, in the defendant's own interests.

Nor is there anything very harsh in that. The plaintiff and others had long contrived and worked to make the block of land on which the plaintiff's house, and the defendant's smithy, stand, a residential block, with the repose and comfort incident to a home in such a locality. Recently the defendant, against the will and opposition of the plaintiff and others like-minded, forced himself and his forge into this block; and there with the smell and the smoke and the noise has made his business a nuisance to those he came amongst against their will: although there seem to be other places and in the near neighbourhood where the forge might work at full blast without offence to any man.

The contention that because the shop is not upon a place

forbidden by by-law of the municipality, the defendant cannot be enjoined from committing a nuisance as long as his business is carried on carefully, is quite without weight. The power of cities to regulate and control the location, erection, and use of buildings such as, among many others, blacksmith-shops and forges, is a restrictive power, not one under which the right can be given to any one man to injure the property of another, or so to deprive another of any of his property or other rights.

Then what should be done?

The defendant is not bound to remove his shop; he may carry his business on there if he chooses and does not in carrying it on create a nuisance; which would mean, doubtless, carrying it on at a loss.

So all that can be done against his will is to put the judgment of the Court in proper form, and leave it to the defendant to consider whether a removal of his shop is not the best ending of this rather bitter litigation at much cost, which neither party can afford.

The form of the judgment will be changed, as was done in *Shotts Iron Co. v. Inglis* (1882), 7 App. Cas. 518, and *Fleming v. Hislop* (1886), 11 App. Cas. 686, so as to enjoin the defendant from carrying on the business of a blacksmith in the manner hitherto pursued by him or in any other manner so as to cause material discomfort and annoyance to the plaintiff; but the operation of the injunction may be stayed, at the defendant's request, for one month, to enable him to comply with it; and, if the defendant choose to remove his business to some other locality where it will not be a nuisance, the stay may be extended for six months more to enable him to do so, upon his request for such extension and his undertaking so to remove, within that time.

With this variation in form, the appeal will be dismissed with costs.

RIDDELL, J.:—An appeal from the judgment of Mr. Justice Sutherland at the trial whereby the defendants were restrained from operating their blacksmith-shop so as “to cause a nuisance by reason of the offensive odours, smoke, or noise.” There was no clause in the order declaring that the business had been carried on in such a way as to cause a nuisance, etc.; but that finding is

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clearly implied, and, if the facts warrant, such a declaration may be inserted.

The evidence fairly read and weighed fully justifies the finding of fact by the trial Judge, "that the noise, smoke, and odours from the premises of the defendant, which are complained of by the plaintiff, do cause material discomfort and annoyance and render the plaintiff's premises less fit for the ordinary purposes of life, making all possible allowances for the local standard of the neighbourhood," and that the business as it is carried on is a nuisance.

In that view, it is of no importance that the blacksmith "performs his work, which is mainly shoeing horses, although occasionally he also sets tires on waggons and does other work of that kind, in a usual and reasonable fashion." *i.e.*, what would be reasonable at another place under other circumstances.

Nor is the permit effective to justify the defendant in committing a nuisance. R.S.O. 1914, ch. 192, sec. 409 (2), seems to me to contemplate a decision by the council formulated in a by-law as to "the location, erection and use of buildings . . . for . . . blacksmith-shops . . ."—and not a by-law requiring the obtaining of a permit for a particular spot, the right to the permit to be determined by the council without a by-law on application of any one desiring to start such an establishment. The council is to act and determine in a general way and by by-law, not in a particular instance and by permit.

The fact that the council directed a permit for this particular place is of no importance—except possibly as a shield against the city—and the defendant receives thereby no rights as against the plaintiff.

I would dismiss the appeal with costs, amending the judgment as indicated.

LENNOX, J., agreed with MEREDITH, C.J.C.P.

MASTEN, J.:—My brethren are, I believe, of opinion that the evidence in this case is not of such a character as to justify the conclusion that the learned trial Judge failed properly to apply the law as laid down in the decided cases. I should not—as it appears to me from reading the evidence—have come to the same conclusion upon the facts, but I do not think that in

a case of this kind we ought to differ from the conclusion or inference of fact drawn by the trial Judge—nor review the decision in fact of the Judge who tried the case and saw and heard the witnesses. This being so, I think that the appeal fails.

Some question has been raised as to the form of the judgment. I think the judgment is in the usual form—but there can be no objection to supplementing it by a declaration that the business as heretofore carried on by the defendant is a nuisance—I think, however, that a reasonable time should be afforded to the defendant in which to adopt such methods as will obviate the nuisance, and would direct a stay of the issue of our judgment till say next October.

I should add that, in my opinion, the Municipal Act, R.S.O. 1914, ch. 192, sec. 409 (2), empowers the city council to pass a general by-law for limiting the location of blacksmith-shops, and for regulating and controlling their use, but does not empower the council to bestow on a blacksmith any powers or privileges which he does not possess by general law.

Judgment below varied.

[The judgment of the Court, as settled and issued, restrained the defendant from operating his blacksmith-shop “in the manner hitherto pursued by him or in any other manner so as to cause a nuisance to the plaintiff by reason of the offensive odours, smoke, or noise.”]

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Insurance—Accident Insurance—Insured Injured by Reason of Jump from Moving Train—Indirect Result of Intentional Act—Voluntary or Negligent Exposure to Unnecessary Danger—Ontario Insurance Act, R.S.O. 1914, ch. 183, sec. 172 (1).

The plaintiff, having a ticket entitling him to be carried on a railway to K. station, deliberately took passage on a train which he knew did not stop at that station, relying upon being able to alight at a point near there, where trains usually stopped. The train, however, did not stop at that point, and he jumped from the train, which was travelling at a speed of from 8 to 12 miles an hour, fell, and was injured:—

Held, that he was not entitled to recover upon a policy of accident insurance; the injury was “the indirect result of his intentional act,” that act “amounting to voluntary or negligent exposure to unnecessary danger:” Ontario Insurance Act, R.S.O. 1914, ch. 183, sec. 172 (1).

Dictum of SEDGEWICK, J., in *Canadian Railway Accident Insurance Co. v. McNevin* (1902), 32 S.C.R. 194, not followed.

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APPEAL by the defendants from the judgment of the County Court of the County of Carleton, in favour of the plaintiff, for the recovery of \$650 upon a policy of accident insurance, for the loss of a hand, which was caused by the plaintiff falling when jumping from a moving train.

February 1. The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and MASTEN, JJ.

A. H. Armstrong, for the appellants, argued that the injury to the plaintiff was the consequence of voluntary and negligent exposure to unnecessary danger, and consequently the plaintiff was disentitled to compensation both under the terms of the contract and under the provisions of the Ontario Insurance Act, R.S.O. 1914, ch. 183, sec. 172 (1).^{*} He cited, in support of his contention, *Neill v. Travelers' Insurance Co.* (1885), 12 S.C.R. 55; *Smith v. Preferred Mutual Accident Association* (1895), 104 Mich. 634; *Shevlin v. American Mutual Accident Association* (1896), 94 Wis. 180; *Small v. Travelers Protective Association* (1903), 118 Ga. 900; *Cornish v. Accident Insurance Co.* (1889), 23 Q.B.D. 453; *Cook v. Grand Trunk R.W. Co.* (1914), 31 O.L.R. 183; *Turgeon v. The King* (1915), 51 S.C.R. 588.

H. S. White, for the plaintiff, respondent, contended that the judgment in appeal was based on a finding of fact, and that the learned trial Judge's finding should not be interfered with. The question was, what should a reasonable man do under the circumstances? There was evidence that the conductor had told the plaintiff to jump. The plaintiff's act did not amount to voluntary and negligent exposure to unnecessary danger: *McDougall v. Grand Trunk R.W. Co.* (1912), 4 O.W.N. 363; Porter's Laws of Insurance, 4th ed., pp. 503, 504. The conductor should not

^{*}172.—(1) In every contract of insurance against accident or casualty or disability, total or partial, the event insured against shall include any bodily injury occasioned by external force or agency, and happening without the direct intent of the person injured, or as the indirect result of his intentional act, such act not amounting to voluntary or negligent exposure to unnecessary danger; and no term, condition, stipulation, warranty or proviso of the contract varying the obligation or liability of the assurer shall as against the assured have any force or validity.

have accepted the plaintiff's railway ticket if he had not intended to deposit him safely at Kemptville.

Armstrong, in reply.

February 18. MEREDITH, C.J.C.P.:—In this action the plaintiff is seeking compensation from an insurance company, under his contract of insurance with them, for the loss of his left hand, as a result of getting off a railway train in motion. The contract provides for the payment of \$650 for the loss of a hand; and also that the insured shall at all times exercise due care and diligence for his personal safety and protection; but it is admitted that the laws of this Province, relating to the conditions of a contract of this character, are applicable to this contract; and that the law, upon the one question now in issue between the parties, the question whether the plaintiff is disentitled to the compensation by reason of his want of such care, is, as applicable to the circumstances of this case, that, so to disentitle the plaintiff, his injury must have been "the indirect result of his intentional act," such act "amounting to voluntary or negligent exposure to unnecessary danger."

That the injury was the indirect result of his intentional act is undeniable; his intention, carried into effect, was to get off the moving train; it could make no difference if the conductor of the train or any one else advised him to do so, and if he would not but for such advice; it was equally his intentional act; but, if such advice could aid his claim in this respect, it is not proved that it was ever given; the conductor denies it, and, to the contrary, asserts positively that he warned the man not to get off, a thing much more likely under the circumstances; and a brakesman of the train also testified that he too warned the man against getting off. The indirect result in question was: that, when the man was thrown down on the ground, his left hand went under a wheel of the car. His statement that something struck him, as he was rising from his fall, and sent him down again with his hand on the rail, is not proved; it is very unlikely that he would know just what happened, and still more unlikely that anything was protruding from the train beyond the steps that could give such a blow—it must have been, if anything, some part of the train; but, whether or not, just the same, it would be an indirect result of his attempt to alight from the train in motion.

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Then, was it a voluntary exposure to unnecessary danger? What else could it be? A desire to get to his home as soon as possible, just because he desired to be there, can hardly be the opposite of voluntary—compulsory. It was his voluntary act in going upon a through train, which he knew did not stop at his home station, a thing which, as a commercial traveller, he must have known it was not his right to do: he voluntarily took the chance of getting the indulgence of the conductor of the train in permitting him to travel on a train which never stopped at the man's home station, taking his chances of getting off some little distance from that station where trains usually stopped, and, it is said, ought always to stop, before crossing the track of another line of a railway, but never to stop there for letting down or taking up passengers. That it was a danger, a great danger even to agile trainmen, is self-evident.

So, too, it was a negligent exposure to unnecessary danger, great danger, as I have said. The man, in his application for this insurance, made in May, 1913, stated that he was then 47 years of age, weighed 200 pounds, and was five feet and eight inches in height; he had been under medical treatment at one time for indigestion, which, his physician thought, was caused by his obesity, which he also thought might be affecting his heart. On the 11th February, in the neighbourhood of Smith's Falls, about 5 o'clock in the afternoon, with the temperature 32° below zero, and with ice and snow upon the ground, this man, dressed in a winter overcoat, and carrying a travelling bag in his right hand, stepped off a through train, the speed of which he says he did not know, but which the conductor of the train testified was from 8 to 12 miles an hour, a mile or so before coming to the place where it usually stopped, and we are seriously asked to find that that was not a negligent exposure to unnecessary danger. It hardly needed the testimony of the train conductor, of 22 years' railroad experience, that it was so much so that he would not have attempted it; but there is that testimony, and that is all there is on that subject. See *Cornish v. Accident Insurance Co.*, 23 Q.B.D. 453; and *Garcelon v. Commercial Travelers' Eastern Accident Association* (1907), 195 Mass. 531.

If the man's life, or a great fortune, depended upon it, one might not blame him for taking the risk; but, even in such a

case, how could the risk be, justly, put upon the insurance company? No part of the fortune would in any case have come to them.

Being a commercial traveller, the plaintiff must have known that he would not have been carried very far without payment of the fare, and he had paid to Kemptville only; and he probably knew the law that he could not be put off except at some safe place: the result of all of which is that he would probably have been let down at Kemptville, or at the worst the next station.

But all that is not very material; nor was a good deal of the evidence which would have been material if the action had been against the railway company. The plaintiff was a man of mature years, entirely his own master, and under no compulsion, except his desire to get home by that train: and it is but proper to add that where passengers will not wait for, or for other reasons will not take, the regular and proper trains, stopping for passengers to alight and board, at their destinations, they ought to remember that they are acting in breach of their contracts and of the rights and interests of the railway company, and are taking risks.

So, too, when entering into an insurance contract, the insured should make sure of the nature of the insurance effected, and not carry away a policy not covering his negligent acts, of all kinds, if he expects after an accident to be treated as if it did.

The learned County Court Judge seems to have treated the *obiter dicta* of a learned Judge of a Court, the shadow of which is much nearer to him than that of this Court, and not the words of the enactment in question, as the law governing the case; so that we are really not reversing his finding of fact: if the case had been dealt with by him upon the very words of the Act, I have the hope and belief that our findings are quite in accord with that which his would have been.

I would allow the appeal.

Of sympathy for the plaintiff it ought to be needless to speak: it does the man no substantial good, and must be known unexpressed as well as expressed, for, in human nature, how could it be but abundant?

RIDDELL, J.:—This appeal from the County Court of the County of Carleton involves an interpretation (1) of the terms

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of a contract of accident insurance and (2) of the statutory provision, R.S.O. 1914, ch. 183, sec. 172 (1).

The plaintiff, a commercial traveller, procured a policy of accident insurance from the defendants providing (amongst other things) for the payment to him of \$650 if he should from external violent accidental causes lose a hand at or above the wrist: "the insured shall at all times exercise due care and diligence for his personal safety and protection."

Being a commercial traveller, using trains every day, he on the 11th February, 1915, was at Smith's Falls, where he had stayed over night—he had a commercial ticket from Brockville to Kemptville, and desired to go to the place last named. Accordingly, he boarded at Smith's Falls a Canadian Pacific Railway train which passed through Kemptville on the way to Montreal. It is sworn and not contradicted that on the train he was asked if he had not heard the brakesman announce that the train did not stop for passengers between Smith's Falls and Montreal, and said "Yes." He admits that he knew that it was a through train, which did not stop with passengers at Kemptville, "only that they usually stopped there . . . at what is known as the Diamond," about $1\frac{1}{2}$ or 2 miles from Kemptville. The conductor took up the ticket—and, later on, upon being asked whether he was going to stop at the Diamond, answered in the negative. The plaintiff, who is described as a stout, obese man, took his "grip" and stepped down on the steps of the car and stepped or jumped off. The speed of the train at the time does not seem to be definitely fixed—the conductor says 8 to 12 miles an hour. No one says any less; the plaintiff does not know. The place was not the place where the train usually stopped, but some distance away—the plaintiff says the conductor said to him as he stepped out of the door, "You had better jump"—this the conductor denies, and says that he told the plaintiff not to jump.

The plaintiff fell, and in some way his arm got under the wheels, and he lost his hand above the wrist.

The County Court Judge held that he had not disentitled himself to relief, and gave him judgment against the insurance company—the company appeal.

The learned County Court Judge is apparently impressed by a definition of "voluntary" in this connection given by Sedgewick, J., in *Canadian Railway Accident Insurance Co. v. McNevin* (1902),

32 S.C.R. 194—that to be a voluntary exposure to unnecessary danger the act must, according to the view of a reasonable man, be madness, except on the hypothesis of voluntary suicide or self-mutilation.

This definition—or description—is *obiter*, not necessary for the decision, and is not concurred in by other Judges. It does not seem to me that “voluntary” has any such extreme connotation: but, in any case, the words of the statute are “voluntary or negligent,” and there may be and often, hourly, is negligence without anything that looks like suicide or self-mutilation.

The question here is—was this unfortunate accident the result of (1) an intentional act (2) not amounting to voluntary or negligent exposure (3) to unnecessary danger?

That the act was intentional is undoubted—was it a negligent exposure to unnecessary danger? This is a question of fact within reasonably wide limits.

The danger was obvious, the plaintiff knew it well—it seems to me to have been unnecessarily incurred. No reason is given why it could be necessary for the plaintiff to get off as and when he did—he lived at Kemptville indeed, but no great exigency called for him to risk life or limb, the only reason he gives is that he had been accustomed to get off at the Diamond when the train stopped (as it usually did)—and that this day the train was not going to stop. That the conductor told him to jump (if he did) adds nothing to the necessity.

I do not press the point that the conductor, having taken up the ticket reading only to Kemptville, would probably not take the chance of carrying him to Montreal, but would almost certainly put him off at or near Kemptville.

Then was the exposure negligent? I accept the criterion of the County Court Judge—was it something “which reasonable and ordinary prudence would pronounce dangerous?” And, on the evidence, I think that this was negligent, something which reasonable and ordinary prudence would pronounce dangerous—the insured did not exercise due care and diligence, as required by the terms of the policy, and the statute does not help him.

As this is a question of fact, not much assistance, except in a general way, can be derived from the cases. The following contain statements of more or less importance in cases not dissimilar:

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The appeal should be allowed with costs and the action dismissed with costs.

LENNOX, J., agreed with the opinion of the Chief Justice.

MASTEN, J., agreed in the result.

Appeal allowed.

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[APPELLATE DIVISION.]

Feb. 18

K. AND S. AUTO TIRE CO. LIMITED V. RUTHERFORD.

Guaranty—Substituted Agreement—Increase in Liability—Knowledge and Acquiescence of Guarantor—Binding Effect.

Held, affirming the judgment of HODGINS, J.A., 34 O.L.R. 639, that the defendant was not released from his guaranty, the substituted agreement, by certain changes and transactions of which he complained, he having had knowledge of these things and having acquiesced in them when he gave the guaranty, and having by his conduct ratified them afterwards.

APPEAL by the defendant from the judgment of HODGINS, J.A., 34 O.L.R. 639.

February 1. The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and MASTEN, JJ.

George Wilkie, for the appellant, argued that he was released from liability under his agreement with the plaintiffs of the 7th February, 1914, by the fact that a new company was not formed as contemplated, and by the appointment of McLaren as the sole agent of the plaintiffs in Quebec, and by other unanticipated circumstances. As the defendant did not, in the second guaranty, assent to these changed conditions, he was not bound by that obligation. He would be bound only by those changes which he had expressly assented to: *Smith's Mercantile Law*,

11th ed., pp. 629, 630, 631; *Holme v. Brunskill* (1877), 3 Q.B.D. 495; *Davies v. London and Provincial Marine Insurance Co.* (1878), 8 Ch. D. 469; *Polak v. Everett* (1876), 1 Q.B.D. 669; *Webster v. Petrie* (1879), 4 Ex.D. 127.

Leighton McCarthy, K.C., for the plaintiffs, respondents, contended that the guaranty was effectual even under the altered conditions. The change assented to by the defendant rendered necessary the changes now relied on as relieving from the guaranty. Besides, the defendant had acquiesced in and approved of the changes made. There had been no repudiation.

Wilkie, in reply.

February 18. MEREDITH, C.J.C.P.:—Before the guaranty deed in question was made, a new scheme for carrying on the business of what was called the McDonell company and of the Kelly company, as well as other business, was arranged, McLaren the defendant's brother-in-law being chiefly interested, and the prime mover in it: and, although the defendant had no personal interest in any of these business arrangements, he was anxious to help McLaren and willing to go a long way in "backing" him for that purpose. The backbone of the new business was to be the Springfield Kelly Tire agency in Quebec, and that could be had only through the plaintiffs; and new business arrangements with them could be effected only by giving to them such a guaranty as the deed provided; and so it was given, and the foundation laid for the carrying out of the new scheme. But, for some reason, it was, soon after the guaranty was given, found to be impracticable and had to be abandoned; and in substitution of it another scheme was adopted, under which the plan to form a new company to carry on the Montreal business was abandoned, and, instead, it was arranged to carry it on in the name of the existing Montreal Kelly company: and that necessitated a change of the guaranty, which was for payment of the \$4,000 and \$2,800 and debts of the proposed new company only: that change was readily assented to by the defendant and effected by a later writing, which in substance guaranteed the payment of the \$4,000 and \$2,800 and new debts of the old company instead of the new; and no objection is now made upon

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that score: but it is said that other onerous arrangements were made by McLaren and others with the plaintiffs respecting the new business that were not comprehended in the first arrangement, and that, as the defendant did not in the second guaranty assent to them, that obligation is not binding on him: that the only assent contained in this writing is to the substitution of the old for the new company "just as if the new company had been formed;" and that that implies want of assent except to that expressly assented to: but I am not able to give my assent to that contention. The change assented to made other changes necessary, and there could be no implication that nothing was to be changed except the debtor. But, however that may be, all these things were the work of McLaren's hands, known to and acquiesced in by the defendant, who also took a lively interest in the business, making, with approval, large payments, by way of "commercial paper," under the guaranties, for months afterwards and until failure and loss were in sight, and then only sought to escape. The fact that some of these changes were not made binding in writing till a day or two after the second guaranty was given, if that is a fact, can make no difference: they were dependent, as the whole new business with the plaintiffs was, on such a guaranty being given, and so could not be made binding until it had been given.

Well knowing of and acquiescing in the things which he now complains of, knowing of and acquiescing in them when he gave the substituted guaranty, and by his conduct ratifying them afterwards, how is it possible for him to escape liability on account of them now?

The case is a very simple and plain one: no one could have any doubt of the defendant's liability, unless, on being led through a labyrinth of cases, he should lose his hold upon the simple facts of this case, confusing them with the circumstances of some of the other cases.

The appeal must be dismissed.

LENNOX, J.:—The argument upon the appeal was practically confined to two points: (a) Was the defendant released from liability under his agreement with the plaintiff company of the 7th February, 1914, by the circumstance that a new company

was not formed, as contemplated, and the transaction of the 10th February, by which, amongst other things, McLaren was appointed the sole agent of the plaintiff company in the Province of Quebec? And (b) what is the effect of the defendant's letter to the plaintiff company of the 27th February, 1914? Incidentally, some portions of the evidence were referred to, but the findings of the learned trial Judge upon questions of fact were not seriously challenged.

It was strenuously argued that, owing to changed circumstances, the guaranty agreement of the 7th February never went into effect, or, if it did, that the defendant was released when the plaintiff company, as alleged, impaired the financial prospects of the Kelly company by obtaining from them an unprofitable agreement on the 10th February.

If a person who holds a guaranty does something inconsistent with the guaranty agreement and to the prejudice of the guarantor, it may be and probably is true that the guarantor will be thereby released. I can find nothing in what is complained of inconsistent with the terms of the agreement of the 7th February, nor was it pointed out in what way the defendant was prejudiced by this transaction, *per se*. As to the letter, I cannot for a moment accede to the argument that the letter is to be read as limited to the \$4,000, the present indebtedness of the Kelly company, or to Kelly company transactions, or that it has not the effect of waiving the provisions of the main agreement as to the formation of a new company, and continuing the liability of the defendant for goods supplied under the new conditions. The defendant's examination upon discovery shews that what was done was in effect what he contemplated from the first—a reorganisation; and it cannot be disputed that the two companies referred to were reorganised.

The Kelly company was carried on by a new organisation, and, by consent of all, the business was done without change of name.

I have read the portions of the defendant's examination put in at the trial. This and his evidence at the trial shew that he entered into the guaranty arrangement to help his brother-in-law, McLaren; that he was not perhaps very inquisitive, but he had ample opportunities for knowing everything that was

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being done; that there was no concealment and no fraudulent dealing; that he saw the account frequently, knew that it was mounting up, and that he never made any objection. Whatever might otherwise have been argued, and I think ineffectively, if the letter of the 27th February had not been written, I think it and the defendant's knowledge, directly and through McLaren, conclusively establish the defendant's liability. The learned trial Judge appears to have gone very thoroughly into the whole subject, and I entirely agree with the conclusions he has arrived at as to the matters involved in this appeal.

I think the appeal should be dismissed with costs.

RIDDELL and MASTEN, JJ., concurred.

Appeal dismissed.

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Feb. 18.

RE BAEDER AND CANADIAN ORDER OF CHOSEN FRIENDS.

Life Insurance—Benefit Certificate Issued by Ontario Society—Designation of Preferred Beneficiaries—Change of Domicile of Assured—Alteration of Designation by Change to Beneficiary of same Class—Will Executed at New Domicile—Effect of Law of Domicile—Trust—Assignment of Chose in Action—Power of Appointment—Insurance Act, R.S.O. 1914, ch. 183, secs. 171 (3), (5), 177 (4), 178, 179—Effect of Prior Known Decision—Judicature Act, R.S.O. 1914, ch. 56, secs. 32, 43 (2).

An Ontario benevolent society in 1890 issued to B., then domiciled in Ontario, a benefit certificate for \$2,000, which provided that this sum should, upon his death, be paid to his three children equally. B. subsequently changed his residence and domicile to the State of New York, and died there in 1915. The policy or certificate was in force at the time of his death. By his will, made in that State, shortly before his death, he provided as follows: "I give devise and bequeath to my granddaughter C. W. all my life insurance that I may have and in force at the time of my death." The will was duly executed according to the laws of Ontario and New York; but, according to the law of the State of New York, beneficiaries in an insurance policy cannot be changed by will:—

Held, that a valid change of beneficiaries was made by the will, and that the \$2,000 should be paid to the grandchild.

Section 171 (3) and (5) of the Insurance Act, R.S.O. 1914, ch. 183, *Lee v. Abdy* (1886), 17 Q.B.D. 309, and *Toronto General Trusts Co. v. Sewell* (1889), 17 O.R. 442, considered.

Per MEREDITH, C.J.C.P.:—The exercise of the right to designate beneficiaries and to make a change within the preferred class cannot be likened to an assignment of a chose in action, nor yet to the exercise of a power of appointment. The thing with which B. was dealing was not money nor property, but only a contract, upon which a right of action might never arise. The rights that he had in respect to the contract—either to abandon it or to take away any possible interest of the original beneficiaries in it—

moved with him when he changed his domicile. But the insurers, a provincial benevolent society, could carry on business only in such manner as the law which gave them legal existence permitted, and so only in accordance with the provisions of the Ontario Insurance Act; and so, by the terms of the contract, the beneficiaries could be changed by will, that is, a will valid as a will in the domicile or place of residence of the testator (sec. 177 (4)); and the laws of the foreign State do not purport to affect, if they could, such a case as this.

Per RIDDELL and MASTEN, JJ.—The words of the Act (secs. 178, 179) make the policy a trust over which the assured has no power of alienation or other power except that of appointment (including change of appointment) until the death of the preferred beneficiaries. It was open to the assured to change the beneficiary by following the words of the statute; and the words of the will were a sufficient declaration.

Per MEREDITH, C.J.C.P.—The case was not regularly before the appellate Court, though referred by a Judge in Chambers. The decision in *Toronto General Trusts Co. v. Sewell*, *supra*, did not stand in the way of the Judge in giving effect to his own opinion (Judicature Act, R.S.O. 1914, ch. 56, sec. 32): logical deductions from the decision might stand in the way, but that was quite a different thing. The case should first have been considered at Chambers (sec. 43 (2)).

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RE
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MOTION by the society for leave to pay insurance moneys into Court and for an order determining who were the persons entitled to share therein.

September 24, 1915. The motion was heard by MIDDLETON, J., in Chambers.

Lyman Lee, for the society.

S. F. Washington, K.C., for Charles Baeder, Minnie Baeder, and Henry Baeder.

F. W. Harcourt, K.C., for the infant Caroline Wagner.

October 16, 1915. MIDDLETON, J.:—The late Jacob Baeder, who died on the 30th March, 1915, originally was domiciled and resided at Guelph, Ontario. While so domiciled, on the 24th July, 1890, he became a member of the Canadian Order of Chosen Friends, an Ontario organisation, and obtained a beneficiary certificate for \$2,000, which provides that this sum shall, upon his death, be paid to Charles, Minnie, and Henry Baeder, his children, equally.

Subsequently Baeder changed his domicile and residence from Guelph to Rochester, New York. By his will, made there on the 24th February, 1915, he gave all his life insurance to his grandchild Caroline Wagner. The rest of his estate he directs to be divided between his children.

It is now contended on behalf of the children that, although

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this policy was issued by an Ontario company in Ontario, the law which governs the operation and effect of the will upon the policy is the law of New York, and that, according to the law of New York, beneficiaries in an insurance policy cannot be changed by will. That this is the law of New York is not disputed.

The contention on the part of the infant is, that the policy is governed by the law of Ontario, and that the insurance money is to be regarded as a trust fund subject to the law of Ontario, which in effect defines the terms of the trust, and that, regarding the provisions of the Ontario statute as constituting and defining these terms, the will is operative, and the grandchild takes.

This view commends itself to me. By the Insurance Act, R.S.O. 1914, ch. 183, sec. 178 (2), the policy and declaration in favour of a preferred beneficiary create a trust in favour of that beneficiary, subject to the powers conferred by sec. 179, enabling the insured to change the beneficiary to some other person falling within the preferred class. This change may be made either by a declaration or by a will.

The statute has become in effect a statutory deed of settlement, reserving to the insured a special power of appointment, to be exercised in the mode pointed out by the statute. The change of the domicile of the insured can have no effect upon the terms of the trust or of the statutory power of changing the beneficiary which is vested in the insured.

It follows that a will executed in accordance with the laws of Ontario must be regarded as an appointment or declaration within the terms of the statute.

In no conceivable way can the statute-law of the country where the insured happens to be domiciled be deemed to be grafted upon this statutory deed of trust. As soon as the contract is made, the rights and powers are crystallised and defined; they cannot be regarded as mutable and subject to change as the domicile of the insured changes. Similar contracts issued in Ontario in favour of the insured cannot be subject to different construction and operation dependent upon the accident of the domicile of the insured. The contract is clearly intended to be governed by the law of Ontario, and the statute expressly so declares.

That a will in accordance with our laws is a proper exercise of a power of appointment, even though it be not valid according

to the law of the domicile, cannot now be disputed: *Murphy v. Deichler*, [1909] A.C. 446.

Two cases are relied upon by Mr. Washington as opposed to this view.

In *Lee v. Abdy* (1886), 17 Q.B.D. 309, an assignment was made in Cape Colony by the insured to his wife. By the law of Cape Colony, a husband cannot convey to his wife, and the assignment was void. It was held that the validity of the contract between the husband and wife had to be determined by the law of Cape Colony, even though the subject-matter of that contract was an insurance policy made in England. Clearly that case has nothing to do with the problem here presented.

In *Toronto General Trusts Co. v. Sewell* (1889), 17 O.R. 442, a policy was issued in a Quebec company by a man domiciled in Ontario; and, while yet domiciled in Ontario, the insured made a declaration by endorsement on the policy. It was held that the law of Ontario governed. This would seem to me beyond controversy, when it is borne in mind that under the Insurance Act the contract was an Ontario contract, to be governed by the law of Ontario; but the ground upon which the decision seems to be placed is that in *Lee v. Abdy* it was determined that the validity of the declaration depended upon the law of the domicile. If that is the true principle, and it is here applied, then the will in question is not valid.

The question is manifestly one of importance, and I do not think it should be left in this unsatisfactory position. I think my proper course is to enlarge the motion before the Appellate Division, where the decision in *Toronto General Trusts Co. v. Sewell*, or rather the reasoning upon which it is founded, will be open to reconsideration and review.

The motion was accordingly set down to be heard by a Divisional Court of the Appellate Division.

January 31. The motion was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and MASTEN, JJ.

S. F. Washington, K.C., for the claimants, the three children of the deceased, argued that, although the certificate was issued by an Ontario society in Ontario, the law which governed the opera-

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tion and effect of the will upon the policy was the law of New York; and, according to the law of that State, beneficiaries in an insurance policy cannot be changed by will: *Toronto General Trusts Co. v. Sewell*, 17 O.R. 442; *National Trust Co. v. Hughes* (1902), 14 Man. R. 41; Halsbury's Laws of England, vol. 6, paras. 327, 330, 333, 334, 337, 338, 339, 344; vol. 27, paras. 309, 310, 311; *Murphy v. Deichler*, [1909] A.C. 446.

J. R. Meredith, for the Official Guardian, representing Caroline Wagner, the infant grandchild, contended that, although the law of the State of New York was as stated, yet the insurance money was to be regarded as a trust fund subject to the law of Ontario, which in effect defined the terms of the trust; and that the will was operative, and the grandchild took: *In re Mégret*, [1901] 1 Ch. 547; *In re Pryce*, [1911] 2 Ch. 286; *Re Bald, Bald v. Bald* (1897), 76 L.T.R. 462; *Northern Trust Co. v. Coldwell* (1914), 25 Man. R. 120.

Washington, in reply, referred to *Garner v. Germania Life Insurance Co.* (1888), 110 N.Y. 266; *Fink v. Fink* (1902), 171 N.Y. 616; Dicey on Conflict of Laws, 2nd ed., pp. 556, 705.

February 18. MEREDITH, C.J.C.P.:—This case is not regularly before this Court. It should first have been considered at Chambers: The Judicature Act, sec. 43 (2). A Judge of the High Court Division has power to refer a case before him, to a Divisional Court, only when a prior known decision of any other Judge of co-ordinate jurisdiction stands in the way of giving effect to his own opinion, and he deems the previous decision to be of sufficient importance to be considered by the higher Court: sec. 32 (2) and (3). No such decision existed. The decision in the case of *Toronto General Trusts Co. v. Sewell*, 17 O.R. 442, did not stand in his way, even if logical deductions from it might, but that is quite a different thing. But the case is now here, and has been argued here, and the parties desire that it should be considered here, and being a case proper for consideration here, it would be inexcusable to send the parties back to Chambers merely to get a ruling there and come here again: though, it should be added, this should not be deemed an encouragement to the sending of cases here irregularly.

The one question argued was: whether a change of beneficiar-

ies, under a benevolent society's benefit certificate, made by will in a foreign country, where its statute-laws did not, speaking generally, permit such a mode of transfer, is good, the will being duly executed with the formalities required to give validity to a will made here and there.

On the one side, it is said that the change is nothing more, nor less, than an assignment of a chose in action, which, being invalid by the law of the State in which the transfer was made, and in which the parties to it were domiciled, is invalid everywhere. And, if that were a full and accurate statement of all the material circumstances, that might be so. But I cannot think it is.

On the other side, it is said that all that was done amounted to no more than the exercise of a power of appointment, and, therefore, if sufficient according to the law here, it is valid. This, too, does not seem to me to be an accurate view of the matter. It is true that the Ontario Insurance Act provides that such a contract of insurance as this was shall, subject to the right of the assured to change beneficiaries within a certain class, create a trust in favour of the beneficiaries. But there is nothing in the name, when all that it is based upon is made plain. The contract is to pay only upon the assured's death; he may or may not, as he sees fit, let it die at any time before he dies; he has made what is tantamount to a partially irrevocable assignment of its benefit, if he chooses to, and can, keep it alive till his death; he may, in effect, cancel that assignment, at any time, provided he makes another, of the same character, to any one within the class. The contract was his, he gave its benefit, if any there should be, to persons within a certain class; he can take it away from them and give it to others, or another, within the same class. It is not very like a power of appointment, which cannot be of the owner's property: it is more like an assignment or a will; and in the English cases has been likened to each, but never, that I know of, to an appointment: see *In re Griffin*, [1902] 1 Ch. 135: so too in the United States of America, where the cases are innumerable, I know of none in which the right of the insured has been treated, or even spoken of, as a power of appointment: the common expression descriptive of it seems to be "designation of beneficiaries," and these very words are those almost invariably employed in the enactment, of this Province, in question; and in the enactment itself there are

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such words as these: "Nothing . . . shall restrict the right to effect or *assign* a policy in any *other* manner allowed by law," meaning any *other* effect or assignment than by change of beneficiaries: sec. 171, sub-sec. (8): so too, under sec. 171 (3), the assured may "identify" the contract as his policy of insurance. It must never be forgotten that the subject-matter is not money nor property, but only a contract, upon which there may never arise any right of action.

But these things seem to me to miss the mark in more than one respect: whether the right of the insured was or was not to exercise a power of appointment, it must be whether it was a dealing with property in Ontario, or with property in the State of New York. One must know why the exercise of a power of appointment without Ontario is valid if it complies with the requirements of the laws of that Province. Here the "property" dealt with was not even, and might never become, a right of action. In law it would ordinarily be "property" in the State of New York, where its owner, subject to the rights of beneficiaries already designated, was. As to him and as to his rights over it, to abandon it or to take away entirely any possible interest of these beneficiaries in it, how can it be said that they did not move with him?

But that is not all: the real case appears to me to be this: the insurers are a provincial benefit society, and can carry on business only in such manner as the law which gives them legal existence permits, and so only in accordance with the provisions of the Ontario Insurance Act, which the society's rules regulate and give effect to. So, by the terms of the contract in question, the beneficiaries can be changed by will, that is, a will valid as a will in the domicile or place of residence of the testator: see sec. 177 (4); and the laws of the foreign State do not purport to affect, if they could, such a case as this; they expressly except it, according to the evidence.

So that, if the beneficiaries have been changed in accordance with the provisions of the provincial enactment, the new beneficiary takes and the old are excluded altogether.

The change relied upon is the bequest by the insured to his granddaughter, the infant party to these proceedings, made in these words: "I give devise and bequeath to my granddaughter Caroline Wagner all my life insurance that I may have and in

force at the time of my death;" and afterwards in the same will referred to thus: "except insurance moneys which I have willed to my grandchild Caroline Wagner."

The fifth sub-section of sec. 171 of the Insurance Act, very widely cutting into the provisions of the first sub-section of that section, is in these words—"Where the declaration describes the subject of it as the insurance or the policy or policies of insurance or the insurance fund of the assured, or uses language of like import in describing it, the declaration, although there exists a declaration in favour of a member or members of the preferred class of beneficiaries, shall operate upon such policy or policies to the extent to which the assured has the right to alter or revoke such last mentioned declaration"—words which seem to be wide enough to support the claim of the grandchild that a valid change of beneficiaries was made by the words of the will which I have quoted: and wide enough, at all events, to cause Mr. Washington to admit, for the former beneficiaries, that they cut out their earlier right, if the laws of the State of New York do not render the change invalid.

The infant party is entitled to the moneys in question: but it is not a case in which any order as to costs should be made, except that those of the Official Guardian should be paid out of the money in question.

RIDDELL, J.:—In 1890, Jacob Baeder, resident and domiciled in Guelph, Ontario, became a member of the Canadian Order of Chosen Friends, an Ontario friendly society, and obtained a beneficiary certificate for \$2,000, payable to his three children (named) equally. In 1900, he changed his residence and domicile to the State of New York: still residing and domiciled there, he made his will on the 25th January, 1915, which would, if our law prevails, give the benefit of the insurance to his granddaughter; and died two months thereafter. The question arising whether the will was effective to change the beneficiary, it was brought before Mr. Justice Middleton, and that learned Judge referred the matter to the Appellate Division under the provisions of the Judicature Act, sec. 32 (2).

It is said that by the law of the State of New York the beneficiaries under an insurance policy of this kind cannot be changed

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by a will, but that the method laid down by the rules of the society must be strictly followed. That this is so is shewn by the cases cited: *Garner v. Germania-Life Insurance Co.*, 110 N.Y. 266; *Sanguinitto v. Goldey* (1903), 88 App. Div. N.Y. 78; *Fink v. Fink*, 171 N.Y. 616, etc.

This is because there is no statute in New York similar to our R.S.O. 1914, ch. 183, sec. 178: and, accordingly, in all policies governed by the law of New York the terms of the contract govern, and no change can be made in it except under the provisions (if any) of the contract itself.

There is no statute in New York forbidding an attempted change in any other way: such an attempted change is wholly ineffectual, but that is all.

Nor do the decisions affect to govern policies under any law than that of the State of New York, and I cannot see that they can be appealed to in the case of this policy, which, by sec. 155 of the Act, is to be construed according to the law of Ontario—rather, the effect of the decisions would be that all the elements of the policy, whether apparent on the face or annexed thereto by valid authority, must be considered. Nowhere do the Legislature or the Courts in New York purport to change a contract made in a foreign country: and it seems to me that all the elements of this contract, expressed or statutory, remain in full force—and that includes the power to change the beneficiary.

The difficulty felt by Mr. Justice Middleton arises from the language employed by Ferguson, J., in *Toronto General Trusts Co. v. Sewell*, 17 O.R. 442. In that case it seems to have been considered that a declaration of beneficiary under the statute was in the same position as an assignment of a policy—and that, applying *Lee v. Abdy*, 17 Q.B.D. 309, the validity of a declaration would depend on the domicile of the declarant. Applying this reasoning to the present case, it would follow that the declaration contained in the will would be governed by the law of the State of New York, and therefore would be invalid. This conclusion my learned brother thought would be wrong—and I agree with him.

While the decision in *Toronto General Trusts Co. v. Sewell* is right, there is a marked difference between the assignment of an insurance policy by its owner, an assignment of his own property—and a declaration of beneficiary, which does not deal with his

property at all, but simply directs where property not his is to go; *Lee v. Abdy* has no application to such a case.

The cases cited in Dicey's Conflict of Laws, pp. 706, 707, are quite conclusive of the matter: *Pouey v. Hordern*, [1900] 1 Ch. 492; *In re Mégret*, [1901] 1 Ch. 547; and *Re Bald, Bald v. Bald*, 66 L.J. Ch. 524, 76 L.T.R. 462. See also Westlake's Private International Law, 5th ed., p. 85, and *In re Kirwan's Trusts* (1883), 25 Ch. D. 373.

If there be a power of appointment given over property in England, that power of appointment will be well exercised if the instrument be in the form required by English law, however ineffective it might be in respect of the property of the person executing the instrument by the law of his domicile: *e.g.*, in the first case above named, a sum of £4,000 was settled by Mme. H., an Englishwoman married to a Frenchman, upon trust to pay to herself the income for her life, and after her death "as she should by deed or will appoint." Domiciled in France, she made a will there exercising the power of appointment. By French law this would have been an invalid appointment, at least had the property been French. It was held that this was "no disposition of property belonging to the testatrix:" and that the appointment was valid under the trust deed, "an English document to be construed according to English law."

In re Mégret, [1901] 1 Ch. 547, is very similar in its facts: while *Re Bald, Bald v. Bald*, 76 L.T.R. 462, is on the conflict between English and Scottish law—it being held that the effect of an appointment depends on the law under which the power was created, not the law under which the power is exercised.

How far the Courts will go in making the law of Ontario applicable to a policy of insurance may be seen in *Gillie v. Young* (1901), 1 O.L.R. 368.

The words of the Act itself make this policy a trust over which the assured has no power of alienation or other power except that of appointment (including change of appointment) until the death of the preferred beneficiaries.

I think, therefore, that it was open to the assured to change the beneficiary by following the words of the statute. It remains to consider whether the words of the will are a sufficient declaration. They are: "All my life insurance that I may have and in force at the time of my death."

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It is contended that this language is sufficient under R.S.O. 1914, ch. 183, sec. 171 (3), (5), which is the same as (1912) 2 Geo. V. ch. 33, sec. 171 (5)—it modifies most materially the previously existing law.

The history of the decisions on the subject of declarations, etc., is not long:—

In *Re Lynn, Lynn v. Toronto General Trusts Co.* (1891), 20 O.R. 475, the declaration by will was a devise of all the real and personal estate of the deceased, including his insurance in the Northwestern Masonic Aid Association, for the benefit of his wife and children—the policy, not otherwise identified, was considered effectively dealt with. This was approved in *McKibbon v. Feegan* (1893), 21 A.R. 87. These were both cases in which the insurance was (in substance) in favour of the assured. So that we are bound to hold that a bequest of a sufficiently identified policy is effective as a declaration, at least in policies in favour of the assured.

Re Cheesborough (1897), 30 O.R. 639, is explained by Boyd, C., in *In re Cochrane* (1908), 16 O.L.R. 328, at pp. 332, 333. The testator had three policies payable to himself, and two designated to beneficiaries, his son and his other children. He devised “all my property, real and personal, and including life insurance policies and certificates to my executors and trustees upon trust . . . for . . . my children.” The Chancellor says: “It does not appear to have been suggested that the words of the will would have any effect” on the two which had been designated; but Ferguson, J., held (30 O.R. at p. 643) that the other three were validly dealt with by the will: “I am . . . of the opinion that, though not identified by number, the policies are otherwise identified when all the policies are given.”

In *Re Harkness* (1904), 8 O.L.R. 720, Teetzel, J., held a direction in a will, “I give the residue of my property, including life insurance, to my wife . . . and to my two youngest children,” effective upon a policy in favour of “his order or heirs.”

In *Re Walters* (1909), 13 O.W.R. 385, Clute, J., held it sufficient to bequeath to a daughter “\$1,000 to be paid out of my insurance moneys at my decease . . .”—but there the policy, as in the *Harkness* case and other cases, was in his own favour. Before this, *In re Cochrane*, 16 O.L.R. 328, had been decided. There a beneficiary certificate for \$1,000 existed in favour of the wife.

The will contained these clauses (p. 332): "(2) I give and bequeath out of my life insurance funds the sum of \$200 to my sister, L.C. (3) All the rest, residue and remainder of insurance funds, real and personal estate of what kind so ever, I give and bequeath to my daughter, C. C. B." Meredith, C.J.C.P. (now C.J.O.), held that clause (2) was invalid, as a sister is not one of the preferred class: but that (3) was effective to give the daughter the whole fund. The Divisional Court (Boyd, C., Magee and Mabee, JJ.) considered that, as the insurance fund under the policy was not his, and the policy was not his, the cases cited did not apply, and that the policy payable to the wife was not in any certain way dealt with by the testator; that, therefore, the direction was invalid, and that the widow was entitled to the whole fund.

It will be seen that it was taken for granted in that case that, had the sister been within the class, the declaration by will would have been effective, although the policy was not in favour of the assured. The case of *Book v. Book* (1900-01), 32 O.R. 206, 1 O.L.R. 86, also takes it for granted that a bequest of a policy properly identified is a declaration under the statute, even although there had been a previous declaration—see also *Re Edwards* (1910), 22 O.L.R. 367. The will must, however, be validly executed: *In re Jansen* (1906), 12 O.L.R. 63. (This last has not yet been considered by the Appellate Division, and we do not decide as to its accuracy).

In re Cochrane came up for consideration in *Re Earl* (1910), 16 O.W.R. 901, 1 O.W.N. 1141. The insured had endorsed upon a policy in the Canadian Home Circles a declaration in favour of his wife; by his will he devised his property, real and personal, to be sold and divided, including "the money that shall come from the Home Circle," one-third for the wife for life and the remainder amongst others coming within the class of preferred beneficiaries. Sir William Meredith, C.J., held that he was bound by *In re Cochrane* to hold the attempted change effective.

At the time of the passing of the Act of 2 Geo. V. ch. 33, the law as laid down in our Courts was:—

1. A direct bequest of an insurance policy is a declaration under the statute.
2. A bequest of "all my policies" covers all policies not already declared.

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It would seem that sec. 171 (5) of 2 Geo. V. ch. 33 was enacted to change the law as laid down in *In re Cochrane*, and I think it is effective for that purpose. Notwithstanding a previous declaration by the assured, and notwithstanding that the assured may have described the policies which are not in law his, as his or as his insurance fund, the declaration now is to be effective.

I think the will in question here is a declaration as required by sec. 171 (3)—and that it is effective to change the beneficiary.

Judgment should go accordingly—costs follow the event.

MASTEN, J.:—I adopt the statement of facts contained in the judgment of Mr. Justice Middleton as follows (setting out the first four paragraphs, as above).

I think this case differs fundamentally from any of the cases cited in support of the applicants' claim.

Toronto General Trusts v. Sewell, 17 O.R. 442, seems broadly distinguishable. In that case no question of foreign domicile arose. The whole transaction was in substance an Ontario transaction. The agreement for the policies was negotiated in Ontario, through the duly authorised agents of the insurance company. The policies were delivered in Ontario to the insured. He was then and until his death a resident of Ontario. He died in Ontario. The funds in question were paid into the High Court in Ontario, where they stood at the time of the application. Lastly, and most important, the endorsements on these policies, appointing his wife to be the beneficiary under them, were executed at Belleville, in Ontario.

Under these circumstances, no question of a foreign domicile subsequently acquired by the insured or of an appointment by him under his will or otherwise, made in any foreign domicile, arises, and no such question was considered by the late Mr. Justice Ferguson.

Neither does the case of *Lee v. Abdy*, 17 Q.B.D. 309, apply. The head-note of that case is as follows: "The plaintiff sued the trustees of an English life insurance company as assignee of a policy of life insurance granted by such company. The assignment of the policy was made in Cape Colony, and at the time of such assignment the assured, the assignor, was, and he remained till his death, domiciled in Cape Colony, and the plaintiff was his wife. By the law of that colony such an assignment was void by reason of the

alleged assignee being the wife of the assignor: *Held*, that the law of Cape Colony applied to the assignment of the policy, and therefore that the defendants were entitled to judgment."

In that case the proceeds of the insurance policy belonged to the estate of the insured. It was his property to realise, assign, or otherwise deal with as he saw fit. He chose to assign it to his wife, he and she being at the time domiciled in Cape Colony. It was the assignment of a chose in action; and the right and capacity of the husband to assign and of the wife to receive an assignment of such chose in action depended on the law of Cape Colony.

In the present case we have a policy of insurance issued in Ontario by an Ontario company to a person then resident in Ontario, with loss payable to his three children. The proceeds of the policy are payable in Ontario, and have in fact been paid into Court here.

After the issue of the policy, the insured removed his domicile to the State of New York, and died there, having made his will there, by which will he appointed the proceeds of the policy in question to his grandchild, in lieu of his children.

The fund in question formed no part of his estate, but was, according to the statute, a trust fund in Ontario in respect to which he was by statute given a limited power to appoint. The original policy and its subject-matter is something in Ontario governed by the laws of Ontario, and is not a chose in action belonging to the testator, nor governed by the law of his domicile.

The statutory provisions relevant to the question are to be found in the Insurance Act, R.S.O. 1914, ch. 183.

By sec. 178, sub-sec. (1), both children and grandchildren are declared to be within the class of preferred beneficiaries.

Sub-section (2) is as follows: "Where the contract of insurance or declaration provides that the insurance money or part thereof, or the interest thereof, shall be for the benefit of a preferred beneficiary or preferred beneficiaries such contract or declaration shall, subject to the right of the assured to apportion or alter as hereinafter provided, create a trust in favour of such beneficiary or beneficiaries, and so long as any object of the trust remains the money payable under the contract shall not be subject to the control of the assured, or of his creditors, or form part of his estate, but this shall not interfere with any transfer or pledge of the contract to any person prior to such declaration."

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Section 179, sub-sec. (1), is as follows: "The assured may by a declaration vary a contract or declaration previously made so as to restrict, extend, transfer or limit the benefits of the insurance to any one or more persons of the class of preferred beneficiaries to the exclusion of any or all others of the class or wholly or partly to one or more for life, or any other term, with remainder to any other or others of the class, but the assured shall not, except as provided by sub-section 7 of section 178, revoke or alter any disposition made under the provisions of this Act in favour of any one or more of the preferred class except in favour of some one or more persons within the preferred class so long as any of the persons of the preferred class in whose favour the contract or declaration is made are living."

The result of these sections appears to make the insurance moneys a trust fund available only to the class of preferred beneficiaries, and with a special and limited power to appoint conferred on the person whose life is insured.

This case is in principle, I think, governed by the decision in *Pouey v. Hordern*, [1900] 1 Ch. 492. In that case, a domiciled Frenchwoman, having under an English settlement a special power of appointment by will over funds in England, was held entitled to exercise the power in such a way as to dispose of the property in a manner inconsistent with her status and capacity under the law of France. And it was held that the exercise of such a power was not a disposition of property belonging to the testatrix. In the course of his judgment Farwell, J., remarks: "The distinction between power and property is well settled, and it is really not relevant to the consideration of the execution of a power to inquire whether the donee of the power can dispose of his property, unless of course there be absolute incapacity to execute any document arising from lunacy or the like."

That case was followed in *In re Mégret*, [1901] 1 Ch. 547 and in *Re Bald, Bald v. Bald*, 76 L.T.R. 462. It was considered and distinguished on the facts, but not dissented from in principle, in *In re Pryce*, [1911] 2 Ch. 286.

In the case of *Murphy v. Deichler*, [1909] A.C. 446, it was held that "where an English power of appointment by will is exercised by a will executed in English form, though the appointor be domiciled abroad and the will be not validly executed according

to the law of domicile, the document may be admitted to probate as a will for the purpose of the appointment, though not admissible for other purposes. This practice has been too long observed to be now disturbed."

This power of appointment or declaration respecting the beneficiary might have been exercised by will or by any other method which complied with the Ontario statute, and the law of the place where the insured executed the power does not govern. Neither the rule that a chose in action follows the domicile of its possessor, nor the rule that the validity of a testamentary disposition of movables is governed by the law of the testator's domicile, has anything to do with this case.

It is a special, and not a general, power, and is, therefore, in its circumstances, nearer to the case of *Pouey v. Hordern*, [1900] 1 Ch. 492, than it is to any of the other cases cited, and none of the cases appear to me to be in conflict with the view contended for by the respondent.

For these reasons, I think that the new appointment was valid, and that the infant grandchild is entitled to the fund.

LENNOX, J., agreed in the result.

Order accordingly.

[APPELLATE DIVISION.]

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Vendor and Purchaser—Agreement for Sale of Land—"Option" in Agreement for Lease—Acceptance—Statute of Frauds—Names of Vendors—Consideration—Mutual Obligations—Period of Option not Specified—Rule against Perpetuities—Revocation of "Option"—Forfeiture—Indefiniteness—Mortgage—Absence of Particularity—Election to Pay in Cash—Action for Specific Performance—Failure to Register Agreement—Subsequent Bonâ Fide Purchasers without Notice—Addition as Parties—Damages for Breach of Contract—Remedy against Purchasers—Measure of Damages—Assessment.

By an informal memorandum in writing, the defendant S. and his wife leased to the plaintiff a house and lot for a term of three years, adding: "We hereby agree to give to" the plaintiff (naming him), "an option to purchase said property," at a price named. No time was set for the exercise of the "option," and the vendors' names did not appear in the body of the memorandum; their signatures were at the end. The plaintiff sued for specific performance, alleging that he had accepted the offer or "option:"—

Held, that the memorandum was sufficient to satisfy the Statute of Frauds, although the vendors' names did not appear in the body of the writing.

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- (2) That the right to purchase was part of the terms of the demise, and it could not be said that there was no consideration; and, if that were not so, the "option" was "taken up" before it was recalled, and so there were mutual obligations constituting consideration on each side.
 - (3) That the case was one of a demise with a right to purchase, that is, to purchase during the demise; it could not be said that the writing gave a perpetual right to buy the land; and the rule against perpetuities could not be invoked to render the agreement void. And, besides (*per* MEREDITH, C.J. C.P.), the plaintiff's claim being confined, in the course of the litigation, to a claim for damages for breach of a common law contract, the rule against perpetuities had no application.
 - (4) That there was no valid revocation of the "option;" there was no provision for forfeiture; and there was no non-payment or other breach that would have operated as a forfeiture, if forfeiture had been provided for.
 - (5) That, although the agreement provided for a mortgage without more particularity than "one half cash, balance on suitable mortgage," the agreement was not unenforceable because of indefiniteness, for it also provided for paying the whole price in cash, and the plaintiff had made it certain by electing to pay in cash.
 - (6) That, although the plaintiff was not entitled to the equitable relief of specific performance, because he failed to register his agreement, and so permitted *bonâ fide* purchasers for value without notice of his rights to acquire the property, he was yet entitled at law to recover damages for breach of contract, but only against his vendors—not against the subsequent purchasers, who had been added as defendants, and who were not alleged to have induced the vendor to break his contract.
- McIntyre v. Stockdale* (1912), 27 O.L.R. 460, commented on.
Bagot Pneumatic Tyre Co. v. Clipper Pneumatic Tyre Co., [1902] 1 Ch. 146, followed.
- (7) That the measure of damages was the difference between the price agreed on and the actual value of the land at the time when the conveyance should have been made; and the damages awarded by the trial Judge were reduced from \$2,500 to \$1,500.
- Judgment of SUTHERLAND, J., varied.

ACTION by a purchaser against his vendors for specific performance of an alleged agreement for the sale and purchase of land.

The action was tried by SUTHERLAND, J., without a jury, at Sandwich.

J. H. Rodd, for the plaintiff.

E. D. Armour, K.C., for the defendants.

November 8, 1915. SUTHERLAND, J.:—The defendant Stodgell on the 1st November, 1910, was the owner of part of lot No. 101 in the 1st concession of the township of Sandwich East, in the county of Essex, and the water lot in front thereof, on which was a dwelling-house. On that date, an agreement in writing was entered into by him and his wife, with the plaintiff, in the following terms:—

"We hereby lease to William M. Bennett for a term of three years from November 1st, 1910, the above house and lot, for a monthly rental of forty dollars (\$40) per month in advance.

"We hereby agree to give to W. M. Bennett an option to purchase said property for \$7,300 cash, or \$7,500 one half cash, balance on suitable mortgage. Taxes and water rates to be paid by us. William M. Bennett to be released from his lease now existing on the house on west half of said lot 101.

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"F. W. Stodgell,

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It is out of this lease and option that the action arises. It was commenced by writ issued on the 9th August, 1913, against F. W. Stodgell and Ellen J. Stodgell, the plaintiff claiming that he had elected to purchase the property before the lease expired, and notified the defendants, and tendered them the purchase-price mentioned in the option; that they had refused to carry out its terms; and he sought specific performance.

The defendant F. W. Stodgell pleaded that the option and right to purchase had expired, and the defendant Ellen J. Stodgell that she had no interest in the property other than an inchoate right to dower and as mortgagee.

The action came on for trial before Middleton, J., on the 4th April, 1914, and during its progress the defendants were allowed to amend and plead the Statute of Frauds. It having also developed that the defendants had given notice to the plaintiff, before action, that the lease and option were at an end, and had thereupon given an option to one F. M. Fox, and had later, in pursuance thereof or otherwise, conveyed the property in question to one Dorothea M. Sale, Middleton, J., dismissed the action, holding that specific performance could not then be granted because before the suit had been commenced the property had been conveyed and the purchaser was not before the Court. He also held that, as the defendants had sold the property for the same price as that mentioned in the option, although a fictitious and greater consideration was named in the conveyance, and as the plaintiff had offered no evidence to shew that the property was greater in value than the price named in the option, no case had been made out for damages. Other considerations were dealt with in the judgment, but the action was dismissed for the reasons mentioned. The trial Judge stated in his judgment that he was "not at all impressed with the conduct of the defendant," and did not give him costs. (See 6 O.W.N. 163).

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An appeal was taken to the Appellate Division, which on the 12th May, 1914, directed that there be a new trial of the action, with leave given "to add Mrs. Sale as a defendant, and, if the respondents" desired, "to add Fox as a defendant. Costs of the abortive trial and of the appeal to be costs to the respondents in any event of the action unless the trial Judge should otherwise order." (See 6 O.W.N. 333.)

The plaintiff thereupon added Fox and Mrs. Sale as defendants, and the action again came for trial before Latchford, J., on the 2nd December, 1914, when the trial was postponed until the next sittings, costs to be costs in the cause; it next came on before Lennox, J., on the 16th March, 1915, when, at the instance of the plaintiff, it was ordered to stand adjourned until the following non-jury sittings, on payment of two months' rent into Court within twenty days, the costs of the day to abide the event unless otherwise ordered by the trial Judge.

At the opening of the trial before me, it was agreed by counsel that the evidence taken at the former trial should be the evidence in so far as it went, to be supplemented by either party as advised. It was also admitted on the part of the defendants that John Sale, a solicitor, had in the transactions referred to in the evidence acted as agent and solicitor for the two added defendants, the defendant Mrs. Sale being his wife.

Certain contentions which had been raised before Middleton, J., were again raised before me on the part of the defendants as follows: (1) that the option was without consideration and revoked; (2) that the Statute of Frauds applied so as to prevent the plaintiff succeeding; and (3) that the offer contained no time-limit, and was therefore void.

I agree with Middleton, J., in the disposition of these questions made in his judgment as reported in 6 O.W.N. 163, 164.

In the spring of 1913, the defendant F. W. Stodgell was apparently in need of money, and made the plaintiff an offer to the effect that, if he would exercise his option to purchase the property, he would make him a reduction in the price mentioned in the written option. The plaintiff desired to take advantage of this offer, and sought to raise the money for the purpose. Pending the negotiations, which continued for a couple of months, the payment of the rent under the lease remained in abeyance. The plaintiff

swears that during the progress of the negotiations he offered to pay the rent, and produced his cheque-book for that purpose, but that the defendant F. W. Stodgell told him to let it rest until the question of the purchase was disposed of.

The defendant Stodgell, on the 20th May, 1913, assumed to put an end to the plaintiff's option to purchase, by a notice in writing served on him, to the following effect: "Take notice that any and all alleged option to purchase part of lot 101 in the 1st concession of the township of Sandwich East, rented by you from F. W. Stodgell on or about the 1st day of October, 1910, is hereby cancelled for non-payment of rent and for breaches of the other conditions contained therein, and for non-performance." On receiving this notice, the plaintiff, through his solicitors, wrote a letter to Mr. Sale, which concludes with the following statement: "Mr. Bennett is prepared to pay Mr. Stodgell the rent if he demands it, but, as Mr. Bennett understood, it was all arranged that this could stand until the final closing of the transaction." This letter was never answered.

At the trial before Middleton, J., Stodgell did not in any satisfactory way deny Bennett's statement about his offer to pay the rent pending the negotiations for the sale. I regret to say that, having read the evidence of the defendant Stodgell given at the first trial, I was not more favourably struck with his conduct than my brother Middleton. I believe the plaintiff's statement that the payment of the rent was postponed by agreement until the negotiations in connection with the sale were completed.

The defendant Stodgell testifies that on the 21st April, 1913, the plaintiff called on him at his office, and that he then asked the plaintiff, "Have you got the money?" to which he replied, "No," and that thereupon he said to him, "Our deal is off then," and that, on the plaintiff complaining and stating to him that he did not think he was treating him squarely, he spoke to him as follows: "I will tell you what I will do. I will give you till the 30th of April, and no longer, to get the money and search the title." The plaintiff says that by this latter date he had abandoned the idea of getting the benefit of the reduction in price which the defendant Stodgell had earlier offered to him. He had been endeavouring to raise the money in part by mortgage upon the property, and

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the solicitors in connection with the loan had been engaged investigating the title.

Notwithstanding the definite statement of the defendant Stodgell that his final intimation to the plaintiff was that he would not wait longer on him than the 30th April, he admits that, subsequent to that day, namely, on the 2nd May, the plaintiff came to him for a description of the property, and that he gave him a description thereof. It appears that the description was in some way faulty, and led to a little delay when the solicitors were investigating the title for the mortgagee.

I credit the evidence of the plaintiff where he testifies that he did verbally notify the defendant Stodgell that he would exercise his option to buy the property at the price named therein. The evidence, I think, shews that he had arranged for the money to carry the transaction through. I do not think the defendant Stodgell was justified in serving the plaintiff with a notice which attempted to cancel the lease and the option to purchase therein contained. The alleged default, when the defendant saw fit to serve his notice, in so far as the lease was concerned, was non-payment of rent. I think it had been theretofore agreed that the payment of this rent should remain in abeyance, and that it was only fair and reasonable that, before attempting to cancel the lease on the ground of its non-payment, the plaintiff should be given an opportunity to pay it. If no rent were actually in default, the option could not be put an end to by the defendant Stodgell without the consent of the plaintiff, as it had some considerable time yet to run, being, as I think, an option for the full period of the lease and ending therewith.

I am therefore of the opinion that the option was a good, valid, and subsisting one at the time of the notice served by the defendant upon the plaintiff, and that the plaintiff was in a position to close the purchase, as indicated in the letter from his solicitors on the 22nd May, 1913.

The defendant Stodgell, through his solicitor, John Sale, is said to have given an option to John Fox on the 12th May, 1914, to purchase the property, and on the same day Sale gave a cheque signed by him as trustee for \$1,000 to Stodgell on alleged account of the purchase. It is said that Sale telephoned to Fox, who lived in Toronto, and asked him if he would buy the property, and that

he agreed to do so, but that on the following day he notified Sale that he would be unable to carry the purchase out. Stodgell was still urgent about getting money, and thereupon Sale effected an arrangement by which a property owned by his wife in the town of Sandwich, and on which money could be raised, should be exchanged for the property in question. Deeds were made of this property to Mrs. Sale, and of Mrs. Sale's property in Sandwich to Stodgell, and subsequently the latter property was shewn to have been sold to an innocent purchaser for value, named Morton.

It would seem that, in the circumstances, and the defendant Mrs. Sale being affected with the notice which her husband had, the plaintiff ought still to get the property in question, and that Mrs. Sale should be obliged to resort to the defendant Stodgell for her money. However, it may well be that specific performance cannot be decreed. I think, however, in the circumstances, that the plaintiff is entitled to damages if the property was at the time of his exercise of the option worth more than the price named therein.

At the trial, the evidence of four different real estate agents was offered as to value. E. N. Bartlett gave it as his opinion that the property was worth \$12,000 or upwards at that time; and one Reaume put a similar valuation upon it. These men appeared to me to give experienced and reliable valuations.

On the part of the defendant, one Bell was called, but his evidence did not strike me as very satisfactory, and particularly with reference to the valuation of the house. He placed a valuation of \$7,500 or \$8,000 on the property; J. B. Churchill placed a valuation of \$7,000 or \$7,500 upon it. He apparently had looked at the property some two or three years ago with a view to purchasing, and at that time, he says, it was offered to him at \$7,500, and he offered \$7,300 and was looking for a bargain.

I have come to the conclusion that the property was worth in the neighbourhood of \$10,000 at least in the spring of 1913. The difference between that sum and \$7,500, named in the option, is \$2,500; and there will therefore be judgment for that amount, less any proper deduction for rent up to May, 1913, and for occupation rent since, at the like rental, excepting so far as rent may have been paid since.

The plaintiff will have the costs of the postponements subse-

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quent to the appeal before Latchford and Lennox, JJ., and of the trial before me; but, under all the circumstances, I do not feel disposed to interfere with the order of the Appellate Division that the costs of the original trial and of the appeal should be costs to the defendants in any event of the action.

The defendants appealed from the judgment of SUTHERLAND, J.

January 31. The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and MASTEN, JJ.

E. D. Armour, K.C., for the appellants. There was no memorandum of the contract sufficient to satisfy the Statute of Frauds, as the vendors are not named save by the signatures, the document simply speaking of them as "we." See *White v. Tomalin* (1890), 19 O.R. 513; *Potter v. Duffield* (1874), L.R. 18 Eq. 4; *Williams v. Byrnes* (1863), 1 Moo. P.C.N.S. 154; *Vandenbergh v. Spooner* (1866), L.R. 1 Ex. 316; *Williams v. Jordan* (1877), 6 Ch. D. 517. There was no consideration for any agreement to sell. If there was any such agreement, it was void as infringing the rule against perpetuities: *London and South Western R.W. Co. v. Gomm* (1882), 20 Ch. D. 562; *Woodall v. Clifton*, [1905] 2 Ch. 257; *Worthing Corporation v. Heather*, [1906] 2 Ch. 532; *United Fuel Supply Co. v. Volcanic Oil and Gas Co.* (1911), 3 O.W.N. 93; Gray on the Rule against Perpetuities, paras. 189 and 190. The offer to sell was withdrawn. The contract was too indefinite to be enforceable: *Matthewson v. Burns* (1913), 30 O.L.R. 186. The plaintiff did not sustain any damages by breach of the agreement.

J. H. Rodd, for the plaintiff, respondent. The plaintiff is clearly entitled to damages if not to specific performance of the agreement: *McIntyre v. Stockdale* (1912), 27 O.L.R. 460; sec. 18 of the Judicature Act, R.S.O. 1914, ch. 56; Labatt on the Law of Options, 36 C.L.J., pp. 521, 524. As to the Statute of Frauds, there could be no doubt about the identity of the parties to the agreement. As to consideration, there were mutual obligations constituting that element. In regard to perpetuity, that question does not arise here, because the time within which to purchase was limited to the life of the lease, namely, three years: *Buckland v. Papillon* (1866), L.R. 2 Ch. 67. The evidence shews there was never any

revocation of the agreement to sell. The judgment appealed from is right in awarding relief against the subsequent purchasers who were added as defendants: *McIntyre v. Stockdale*, 27 O.L.R. 460; *Savereux v. Tourangeau* (1908), 16 O.L.R. 600.

Armour, in reply.

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February 18. MEREDITH, C.J.C.P.:—The plaintiff and the defendant Stodgell entered into a very plain agreement for the sale by that defendant to the plaintiff of the residential property in question for \$7,500; an agreement which might, and which ought to, have been carried out promptly without the cost of a farthing in litigation. Instead of that, the simple bargain, so made in May, 1910, has not yet been carried out, nor have the rights of the parties to it been finally settled; instead, the parties have been engaged, since August, 1913, and still are engaged, in litigation over it: the litigation has now come to the Appellate Division twice; and in the High Court Division the case came on for trial four times, and was twice tried.

Really none of this wasteful conduct has arisen out of any doubt about the bargain, or that which, between business men, should have been done under it; but, beginning with the annoyances arising from the buying of valuable property by a man without the means of paying for it, unless he could borrow a large part of them upon the security of the property bought, a feud has arisen between buyer and seller, in which each party is willing to do almost anything rather than let the other have his way regarding the sale, and the residential property in question affords them a ready battle-field; and so too we have points of law, of all sorts and kinds, supported by great fortifications of cases and law-books, raised at every stage of the conflict; points of law some of which, I am sure, would not be thought of, much less earnestly pressed, ordinarily.

The first point made is: that there was no contract sufficient to satisfy the provisions of the Statute of Frauds; next, that there was no consideration for any agreement to sell; next, that, if any such agreement, it is invalid under the rule against perpetuities: and, after all that, that the offer to sell was validly retracted; and, yet again, that the contract is too indefinite to be enforceable: and, yet again, that the plaintiff has not sustained any legal damages by reason of breach of the agreement.

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The questions of revocation, uncertainty as to parties, and as to the rule against perpetuity, were considered at the first trial, and an opinion given by the trial Judge upon them altogether adverse to the seller's contention; and as, upon the first appeal, a new trial was directed, it would seem that these questions must have been considered of no weight, for, if an answer to the action, why direct a new trial? But the formal order made upon that appeal does not preclude the seller from again raising these questions, and the opinion of the trial Judge was extra-judicial, having been given after he had dismissed the action on other grounds. So we must now deal with all the questions presented for our consideration.

The first point is based upon the fact that the sellers' names do not appear in the writing evidencing the sale, that the sellers have merely signed these names to it as the persons referred to in it by the personal pronoun "we." But how can there be any uncertainty vitiating the document in that respect? If so, the vast majority of all the mercantile instruments by which the whole business of the country is carried on ought to be deemed worthless because uncertain. No case does or could give any encouragement to the point. The Ontario case, mainly relied upon, was a case in which the buyer's name did not appear in any way in the body of the writing; but, if the writing had begun with the words "we, seller and buyer," and was signed by two persons, can it be imagined that the result would have been the same; and, if the writing had been an open one, such as is not uncommon in advertisements and otherwise, could it be contended that, after acceptance in writing, it was invalid for uncertainty? There is more feud than law in this point, and indeed in all these points of law arising out of that feud.

The right to purchase was part of the terms of the demise of the lands, and so it is futile to contend that there was no consideration. And, if that were not so, the "option," as it was called, was "taken up" before it was recalled, and so there were mutual obligations constituting consideration on each side.

As the plaintiff is now seeking only common law rights for breach of a common law contract, what has the rule against perpetuities to do with the case? The contract gave at law no kind of interest in the land, equity did; but, if the plaintiff wants none

of your equity, what has equity to do with the case? Besides this, the contract is limited by the term demised, the right is to buy within that three-year term; however stated, the case is one of a demise with a right to purchase, that is, to purchase during the demise. And, if that were not so, it would be too absurd even for the law or equity to say that the writing gave a perpetual right to buy the land. That would be quite too easy a means of discovering perpetual motion. The cases relied upon to support this point are again so plain against it, that there can be only one reason for urging it. In one the agreement was to convey whenever the land might be required by a railway company; so the Court was hedged in, it could not say the parties meant a reasonable time, because they had said they did not, they had said they meant whenever required for the railway, and it might not be required within the rule's limit of time; railway companies may be very long-lived. Another case was one of a lease with right of purchase, just like this case, except that the lease in that case was one for 99 years, and in this it is one for 3 years, and so the right was one covering a period that might easily exceed the rule's limit; and the other case was one of the same kind, the term being 30 years, and so also objectionable to the rule.

The findings of fact at the trial are against the contention that there was a valid revocation of the "options", and the evidence supports that finding. There were mutterings and notices, but these were waived by the conduct of the parties in continuing to act on the basis of the agreement being in full force, and with a view to completing the purchase. And, apart from this, the alleged revocation took place during the currency of the term demised; and so the notice of revocation was put on the grounds of forfeiture for non-payment of rent "and for breach of other conditions" not named. But there is something to be said against that: there was no provision for forfeiture, and so no forfeiture; if there had been, it would have been relieved against; and the trial Judge has found that there was no non-payment or other breach that would have operated as a forfeiture, if there had been a forfeiture-provision in the agreement between the parties.

And, lastly, the indefiniteness relied upon is that the agreement provides for a mortgage without more particularity than "one half cash, balance on suitable mortgage:" but it also provides for

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paying the whole price in cash, and the purchaser, having the "option," has made it all quite certain by electing to pay in cash.

So much for wasted energy, and at last we come to the real points of the case.

Upon the direction for a new trial, and the trial had accordingly, to assess the damages of the plaintiff, sustained in consequence of the seller's breach of his contract to sell, two subsequent purchasers have been added as defendants, and it seems to have been taken for granted that they are equally liable, with the contractor, for the breach of his contract, to which they were in no sense parties or privies. As there is no pretence that they were proceeded against for damages for inducing the contractor to break his contract, or otherwise than upon the written contract in question, I am at a loss to understand how it can have been, or how it can be now, contended that the judgment against them can stand.

The right to damages was the right at law; equity interfered only to give other rights where damages would not afford adequate relief: I am speaking of course only of equitable relief when there is also a remedy at law. At first a plaintiff had to go to the court which could grant the relief he sought; each maintained its separate jurisdiction: that was found inconvenient, and the right to give, in a court of equity, the relief which could before be had only in a court of law, was, in cases where equitable relief was sought, but could or would not be awarded, conferred by statute on courts of equity, and so a party was not driven back to a court of law for relief in damages for breach of the contract; and now, since the fusion of law and equity, any relief may be given in the now one Court which could formerly have been given in either. All of which means that in this action, although the plaintiff cannot have the equitable relief of specific performance, because he failed to register his agreement, and so permitted, it is said, a *bonâ fide* purchaser, for valuable consideration without notice of his rights, to acquire the property, yet he can have the common law relief, damages for breach of contract; but how can any one but the parties to that contract be liable upon it?

No case has been cited in support of the judgment against the defendants who were not parties to the contract: and, as it seems to me, it would be imposing an entirely new liability, either at law or in equity, to impose any such obligation, except in the

way I have mentioned, which, if it gave any right of action, would give one at law, not in equity. The property may be followed so long as it is in the hands of a taker with notice of the contract of sale, but a right of action for damages for breach of the contract against one who is in no sense a party to it seems to me to be out of the question. There is a case—*McIntyre v. Stockdale*, 27 O.L.R. 460—in which that which seems to me to have been a long step in advance of any known legal or equitable award of damages was taken by a trial Judge in this Province. It was decided by him that in a case, for specific performance of a contract of sale of land, in which there could be no right to damages at law, there was a right to damages in equity, a subsequent sale of the land, by the vendor to a third person, having defeated the right to specific performance sought on the ground of part performance only. As I understand that judgment, it admits that no such relief could be given in equity before the fusion of law and equity into one Court, no such relief under the ordinary jurisdiction of the Court of Chancery, nor under the enactment known as Lord Cairns' Act, but that, as in the fusion, the right at law to award damages, added to the rights in equity, that fusion gave the right which he exercised in that case; but, as the case before him was one over which the common law courts had no power, it was impossible that the addition of common law rights to equity rights, which admittedly did not cover such power, could confer any such right, any more than one added to two could make four. The learned Judge dissented from two judgments of Chitty, J., which were quite in point, *In re Northumberland Avenue Hotel Co.* (1886), 33 Ch. D. 16, and *Lavery v. Pursell* (1888), 39 Ch. D. 508; seeming to think that Chitty, J., had overlooked the Judicature Act, by which common law rights could be enforced as well as equitable rights; but there were the best of reasons for not referring to common law rights, because the case was one in which common law courts never could have had any jurisdiction—a case for specific performance on the ground of part performance. He relied upon the case of *Elmore v. Pirrie* (1887), 57 L.T.R. 333, in which the fact that the fusion of law and equity had added much to the power of courts of equity in cases such as this was mentioned; but I cannot see how that helps this ruling; what it added was the common law right of action for breach of a contract binding at law for the sale of lands, a right

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which a court of equity had not, until the fusion; unless it was coupled with a claim for specific performance, and then had it only by virtue of Lord Cairns' Act.

I am therefore unable to follow the learned Judge in this step he has taken: as well as unable to follow the learned Judge whose judgment is now in appeal in this case, in awarding damages for breach of a contract against persons who were in no manner parties to it: and I should point out that, in the owner of the land selling it to his co-defendants, he and they were quite within their legal and equitable right and doing no wrong to any one, provided it was done subject to the rights of the plaintiff, if he had any, and whether he had or not.

It follows, therefore, that the appeal of the added defendants should be allowed, and the action dismissed as to them with such costs of both as they have incurred in their own defence, and which are separable from the costs of their co-defendant.

As to the defendant Stodgell, one question remains to be considered; the question of damages. The damages for breach of the contract have been assessed at \$2,500; that is to say, the man who bought the land for the price of \$7,500 now says that the man who sold it to him for that price should pay damages as if the land were really worth \$10,000 at the time the transaction should have been closed.

The measure of damages is the difference between the price agreed on and the actual value of the land at the time when the conveyance should have been made. There is some evidence that that difference is \$2,500: but that rests upon the testimony of land agents speaking of inflated speculative value, and is not the kind of evidence to be too much relied upon. Land agents' interests nearly always are served by enhancement of value—"booming" or "boosting," as it is sometimes called. The "proof of the pudding" is always much more dependable; and the actual sale made in good faith to Morton shews that \$1,200 was the enhanced price. That is something substantial, and actual, to go upon. There would be also some other items of inconsiderable amount in the way of damages which, with some reasonable advance over the \$1,200, would make \$1,500; and that amount seems to me to be ample compensation to the plaintiff as reasonable damages for the defendant Stodgell's breach of his agreement in question.

I would therefore allow the appeal to that extent; that is, to the extent of reducing the amount of the damages assessed from \$2,500 to \$1,500, and would make no order as to the costs of the appeal as between these two parties to it.

Since the foregoing opinion was written, my attention has been directed to the case *Bagot Pneumatic Tyre Co. v. Clipper Pneumatic Tyre Co.*, [1902] 1 Ch. 146, which seems to me to be direct authority for the views I have expressed on the question of liability, in this action, of the added defendants. Vaughan Williams, L.J., there used these very pertinent words (p. 157): "If the judgments in *Werderman v. Société Générale d'Electricité* (1881), 19 Ch. D. 246, are looked at carefully, I think it will be seen that all that is decided by that case is this, that if you had notice of a contract between the person under whom you claim property, real or personal, and a former owner of the property, whereby a charge or incumbrance was imposed upon the property of which you thus take possession and have the enjoyment, you take the property subject to that charge or incumbrance, and can only hold it subject thereto. But that proposition does not, as it seems to me, involve the consequence that the assignee of the property is liable to be sued for non-performance of the terms contained in the contract to which he was not a party."

RIDDELL, J.:—I agree.

LENNOX, J.:—I agree.

MASTEN, J.:—This is an appeal by the defendant from the judgment of Sutherland, J., delivered on the 8th November, 1915. The case was tried before Sutherland, J., without a jury, and he awarded to the plaintiff, against all the defendants, damages in the sum of \$2,500 in lieu of specific performance.

The first question raised by the appellant is "that, there being no time-limit, the option is too remote and therefore void." In order to determine this question it is necessary to construe the instrument on which the action is founded. If the option is coterminous with the lease, then the objection does not hold. If the option is independent of the lease, and prescribes no period within which it is to be exercised, then, upon the cases cited on behalf of the appellant, the option appears to be void.

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While the agreement is informal, and on its face not easy of construction, yet it seems to me that, upon a consideration of the elementary rules relating to the interpretation of documents, it is not insoluble. On the one hand, we have the rule that the sense and meaning of an instrument should be collected from the terms used. "You must have regard, not to the presumed intention of the parties, but to the meaning of the words which they have used:" *Exp. p. Chick, In re Meredith* (1879), 11 Ch. D. 731, 739. Here the parties have not, in the clause giving the option, mentioned any period within which the option is to be exercised. Are we at liberty to import such a term into the agreement because it may be presumed that the intention of the parties was to prescribe such a limit?

On the other hand, and in conflict with this argument, we have two elementary rules or principles of construction: (a) to look at the whole document, and not to a part of it, and to give effect, if possible, to every word or at all events to every provision: *Hayne v. Cummings* (1864), 16 C.B.N.S. 421, at p. 427; *In re Jodrell* (1890), 44 Ch. D. 590, at p. 605; (b) that where there are two modes of reading an instrument the Court should lean towards that construction which preserves rather than towards that which destroys — *ut res magis valeat quam pereat*: *Langston v. Langston* (1834), 2 Cl. & F. 194, at p. 234; *In re Florence Land and Public Works Co.* (1878), 10 Ch. D. 530, at p. 544.

Having regard to the facts that in the present case the agreement for the lease and the agreement for sale are embraced in the one document and made at the one time, that the acceptance of the lease was the consideration for the option, that both the lease and the option relate to the same lands, I think the option was an integral part of the lease, and that a reasonable time during which the option ran was to be during the relationship of landlord and tenant between the parties. In other words, that the term and the option were coterminous.

Any other conclusion would have the effect of nullifying that portion of the instrument relating to the option, because, if the option is indefinite in duration, it is clearly bad, as pointed out by Mr. Armour.

There is no clause in the agreement preventing us limiting the time during which the option was to be exercised, as there was in

Trevelyan v. Trevelyan (1885), 53 L.T.R. 853, or in *London and South Western R.W. Co. v. Gomm*, 20 Ch. D. 562, see at p. 580. The reasonable time within which the option to purchase must be exercised is, it seems to me, the three years during which the term is to run, or such time thereafter as the relationship of landlord and tenant on the terms of the lease should exist: *Moss v. Barton* (1866), L.R. 1 Eq. 474; *Buckland v. Papillon* (1866), L.R. 1 Eq. 477, L.R. 2 Ch. 67, see especially p. 70, *per* Lord Chelmsford, L.C. In other words, when the relation of landlord and tenant comes to an end, the option, *ipso facto*, also ends. It is an integral part of the lease: *In re Adams and Kensington Vestry* (1884), 27 Ch. D. 394; *Matthewson v. Burns*, 30 O.L.R. 186; not entirely distinct as in *Davis v. Shaw* (1910), 21 O.L.R. 474.

The second point raised in support of the appeal is, that there is not a sufficient memorandum within the Statute of Frauds. The words of the option are: "We hereby agree to give to W. M. Bennett an option to purchase said property for \$7,300 cash, or \$7,500 one half cash, balance on suitable mortgage. . . . F. W. Stodgell, Ellen J. Stodgell." This identifies the vendors as described in the option by the term "we," and makes it perfectly plain both who are the vendors and who is the purchaser. In the cases referred to in support of this contention, the terms of the instrument in question were in every case such as made one of the parties quite uncertain, and the conclusion to be deduced from those cases is that, where the agreement itself does not identify the parties, evidence cannot be supplied extraneously. It does not appear to me, therefore, that this ground of appeal can be maintained.

With respect to the other questions raised by the appeal, I agree with the judgment which has been prepared by the Chief Justice, and have nothing to add to it, and I also agree in the conclusion at which he has arrived.

Appeal allowed in part.

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[APPELLATE DIVISION.]

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Feb. 18.

WALLACE V. CITY OF WINDSOR.

Highway—Nonrepair—Injury to Pedestrian—Actionable Negligence of Municipal Corporation—Failure to Give Notice of Claim and Injury in Time—Reasonable Excuse for Delay—Prejudice to Corporation—Municipal Act, R.S.O. 1914, ch. 192, sec. 460 (4), (5).

The plaintiff was injured by a fall upon a sidewalk found to be out of repair by reason of actionable negligence on the part of the defendants, an urban municipality. The plaintiff brought this action to recover damages for her injuries; but the notice required by sec. 460 (4) of the Municipal Act, R.S.O. 1914, ch. 192, to be given within seven days after the injury, was not given until nearly a month after it. The plaintiff's excuse (under sec. 460 (5)), for not giving the notice in time was, that she believed the injury was only a sprained ankle, and that, although she suffered great pain, which, she alleged, incapacitated her from giving notice, she did not contemplate bringing an action until—more than three weeks after the injury—she consulted a doctor, who found that there was a fracture of the fibula and another injury. Notice was at once given to the defendants, and the action was begun:—

Held, by MIDDLETON, J., the trial Judge, that there was no reasonable excuse for not giving the notice in time; and, although the defendants were not prejudiced in their defence, that the action must be dismissed.

Upon appeal to a Court composed of four Judges, there was an equal division of opinion, and the judgment of MIDDLETON, J., stood as if affirmed.

Per MEREDITH, C.J.C.P. and MASTEN, J.:—There was no reasonable excuse for the delay in giving notice; and, *per* MEREDITH, C.J.C.P., the defendants were prejudiced in their defence.

Per RIDDELL and LENNOX, JJ.:—The delay was sufficiently excused by the circumstances, and the defendants were not prejudiced.

Review of the English and Scottish cases under the Employers' Liability Acts, and rules deducible therefrom.

ACTION to recover damages for injuries sustained by the plaintiff by a fall upon a sidewalk in the city of Windsor.

October 8 and 9, 1915. The action was tried by MIDDLETON, J., without a jury, at Sandwich.

F. C. Kerby, for the plaintiff.

F. D. Davis, for the defendants.

October 20, 1915. MIDDLETON, J.:—On the 13th February, 1915, the plaintiff fell on the sidewalk upon Ouellette avenue, one of the main streets of Windsor, and sustained serious injury. The fall was undoubtedly caused by the defective condition of the sidewalk, and I think that the lack of repair of the sidewalk was the result of actionable negligence on the part of the municipality.

The walk was constructed of concrete, but a hole had formed

in it as the result of natural decay. This hole had been in existence for a long time; and, although it was upon a main thoroughfare of the city, and daily passed by thousands, it was permitted to remain.

It may well be that the attention of those charged with the repair of the road was not drawn to it until after the accident, but the negligence was the lack of any kind of system to secure information as to the condition of the municipal pavements.

The difficulty in the plaintiff's way is that, although the accident took place on the 13th February, no notice was given to the municipality until the 12th March; the statute, sec. 460 of the Municipal Act, R.S.O. 1914, ch. 192, providing (sub-sec.(4)) that no action shall be brought in the case of an urban municipality unless notice of the claim and of the injury complained of is given within seven days after the happening of the injury. The Court has power, under sub-sec. (5), to disregard the failure to give notice if of opinion that there is reasonable excuse for the lack of notice and that the corporation was not thereby prejudiced in its defence.

I do not think that the corporation was in any way prejudiced in its defence in this action, but I cannot find on the evidence that there was a reasonable excuse for the lack of notice. The case is entirely governed by *Anderson v. City of Toronto* (1908), 15 O.L.R. 643. I do not think it can be said that the plaintiff was in any such condition as to be incapable of considering her situation except as a sufferer. She undoubtedly was in pain from the time of the accident, but was in no such condition as that of the plaintiff in *Morrison v. City of Toronto* (1906), 12 O.L.R. 333.

What happened was that the plaintiff's foot was undoubtedly seriously injured. The fibula was cracked or broken, but not so that the pieces separated. On the opposite side a very small portion of the cartilaginous substance was broken. The plaintiff went home unaided. She ought to have laid herself up and had the injury properly taken care of. Instead of that, she did not seek medical aid until the 11th March, and then the limb was much inflamed and very painful.

I cannot at all credit the daughter's evidence as to unconsciousness and delirium and hysteria during the whole of this month. Everything points to the fact that that young lady was too much saturated with what was said in *Morrison v. City of Toronto*.

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The plaintiff's own version impressed me much more. She says she did not realise that she was seriously injured; she did not know the statute nor the necessity of giving notice. Had she realised that she was seriously injured and known of the statute, there was nothing to prevent the notice being given.

If any such condition existed as portrayed by Mr. Kerby, it is inconceivable that medical assistance would not have been earlier sought. As it was, on the 12th March the plaintiff went unaided to the doctor's office.

It is perhaps proper that I should express my views as to the amount of the damages which the plaintiff is entitled to, if any other Court can find a way of relieving her. I think that a very large amount of the suffering the plaintiff has undoubtedly borne is attributable to her own negligent treatment of her injury and its consequent aggravation. The fracture has now healed satisfactorily, and with proper attention there is no reason why there should not be an entirely satisfactory recovery. Dr. Gow's testimony may be accepted without hesitation. I would allow \$600 if the plaintiff can recover.

The action should be dismissed without costs.

The plaintiff appealed from the judgment of MIDDLETON, J.

February 2. The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and MASTEN, JJ.

A. C. McMaster, for the appellant, argued that there had been no unreasonable delay in giving the statutory notice, and that there had been reasonable excuse for not giving it in time. The injury was latent. In any event, the defendants had not been prejudiced by the delay. In support of his contentions he referred to *Flood v. Smith & Leishman*, [1915] W.C. & I.R. 212, at p. 216; *Thompson v. North-Eastern Marine Engineering Co.*, [1914] W.C. & I.R. 13; *O'Connor v. City of Hamilton* (1904-5), 8 O.L.R. 391, 10 O.L.R. 529; *Clapp v. Carter* (1914), 7 B.W.C.C. 28, at p. 33; *Potter v. John Welch & Sons Limited*, [1914] 3 K.B. 1020, at p. 1031.

F. D. Davis, for the defendants, respondents, contended that there was no reasonable excuse for not giving the notice in time. The notice was not dispensed with by reason merely

of the defendants not being prejudiced by the omission to give it: *Morrison v. City of Toronto*, 12 O.L.R. 333; *Anderson v. City of Toronto*, 15 O.L.R. 643.

McMaster, in reply, referred to *City of Kingston v. Drennan* (1897), 27 S.C.R. 46.

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February 18. MEREDITH, C.J.C.P.:—This appeal arises out of a preliminary question: whether the plaintiff has lost any right of action she might have had, by failing to give notice of her claim and of the injury complained of, in accordance with the provisions of the Municipal Act, sec. 460 (4): and in nearly all of these cases the defendants are put at a disadvantage, because that preliminary question is seldom, if ever, considered until the whole case has been heard: and then, if it be plain that a plaintiff has a good claim, that, through the defendants' fault, she has sustained serious bodily injury, for which she ought to be compensated, she is not likely to be turned away empty-handed, because of what sympathy may call a wretched technicality. Here, far removed from the scene of action, we ought to be free from such influences, but human nature is human nature everywhere, and so it may be that defendants in such a case are somewhat handicapped wherever they may go.

Perhaps the best preventive of such influences is to begin by reading just what the Legislature has said to us upon the subject: "No action shall be brought for the recovery of . . . damages," such as the plaintiff claims in this action, "unless notice in writing of the claim and of the injury complained of has been served . . . within seven days after the happening of the injury;" but "failure to give. . . the notice shall not be a bar to the action, if the Court or Judge before whom the action is tried is of opinion that there is reasonable excuse for the want or insufficiency of the notice and that the corporation was not thereby prejudiced in its defence."

And, besides that, there is this imperative injunction: "Every Act shall be deemed remedial . . . and shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act, and of the provision or enactment, according to the true intent, meaning and spirit thereof:" The Interpretation Act, R.S.O. 1914, ch. 1, sec. 10.

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What then was the intent of the enactment in question? To prevent false claims? Undoubtedly, in part; but undoubtedly also, and mainly, to give to the corporations a fair chance to investigate and settle true, as well as contest false, claims. True claims are sometimes, indeed frequently, the basis of demands for extravagant damages.

Such claims must now be prosecuted within three months, but, even with that limitation, in many, indeed in nearly all, cases, the corporation must be at a great, and very unfair, disadvantage, if the first intimation of claim or injury come with a writ issued at the last moment. The fairness and importance of prompt notice of an accident, out of which a claim for damages will probably come, is obvious, statute or no statute requiring it.

It was not given in this case in time, and so the claim must fail, unless the plaintiff has reasonable excuse for failing to comply with the terms of the enactment, and unless it is proved that the defendants were not prejudiced in their defence by such failure.

It may be hard upon the plaintiff if she have a good claim which cannot be enforced, but it would be much harder, coupled with injustice, if the Judges and Courts should altogether, or largely, deprive corporations of the needed protection the enactment affords.

Then is there reasonable excuse for the want of notice? Excuse from whose point of view? Not from a plaintiff's; that would be easily satisfied, but necessarily from the defendants'; they have been deprived of their statutable right, the excuse must be for that deprivation. The excuse is that the plaintiff did not know, in time to give the notice, that she had suffered anything but a trivial injury, in respect of which she had no intention of making any claim, and that the defendants were not in any way prejudiced by her default. If that be so, and if it be the whole story, her default might very well be excused; indeed one might reasonably expect that the defendants' council would be willing to accept it themselves; especially as the cost of the acceptance would not come out of their private purses, but would be paid by the whole body of the ratepayers of the municipality, of whom the plaintiff may be one. The question of prejudice to the defendants must often necessarily be involved in the question whether there was or was not reasonable excuse, notwithstanding, and quite apart

from the fact, that it is also a separate and vital question. Then is that the whole story? No one has asserted, and no one could assert, that it is.

The plaintiff's leg was broken, the fibula, or shin-bone, fractured, and she asserts that that injury was caused by an accident, the accident in respect of which this action is brought.

The rest of the story, as far as it is material, might be told in a few words, but it may be better to give it, uncondensed, in her own words and in the words of her physician:—

Letta Wallace, sworn, examined by Mr. Kerby:—

“Q. Mrs. Wallace, you are the plaintiff in this action? A. Yes, sir.

“Q. And you are suing the city for damages for an accident? A. Yes.

“Q. When did this fall occur? A. On the 13th of February.

“Q. What year? A. This year, 1915.

“Q. The 13th of February, 1915—what time of day did it occur? A. A quarter to nine in the evening.

“Q. Do you know what day of the week that was? A. Saturday evening.

“Q. Where did the fall happen? A. On Ouellette avenue, right near Mr. Harvey's butcher-shop.

“Q. Where were you going at the time this occurred to you? A. I was going to Mr. Harvey's butcher-shop.

“Q. And what happened? A. I was going along the street, and my heel went into a hole in the sidewalk, and I fell.

“His Lordship: How deep was the hole? A. Well, I cannot tell you that.

“His Lordship: I suppose you do not know. The first thing you knew, you were down? A. I was down, yes, sir, and I was dazed for quite a little while afterwards, so I did not think of the hole.

“Mr. Kerby. Q. Then, you say, you stepped into this hole, and you fell? A. Yes, sir.

“Q. As you fell, what happened to you, were you injured? A. Yes, sir, I was badly injured.

“Q. What were your injuries? A. I was injured in my back, and my ankle was badly injured.

“Q. Now then, as you fell, this ankle was crushed? A. Yes, sir.

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"Q. And did you suffer any pain? A. Yes, sir, a great deal of pain.

"His Lordship: There is no use to ask that, of course.

"Mr. Kerby: Then immediately after that, and this ankle was crushed—what was your mental condition? A. I was bad for three or four weeks, could not attend to anything—I was crazy with pain.

"Q. Did any one assist you? A. After, when I came to myself I was standing up against the building. I do not know if it was Mr. Harvey's or Mr. Alice's, but it was there some place.

"Q. You found yourself standing up against the building? A. Yes, and it was some time before I could move away from there and try to make it to my home.

"Q. You say you found yourself up against the building? A. Yes, sir.

"Q. Do you know when you staggered against the building? A. No, sir.

"Q. Then you did find your way home that night? A. I did, after quite a while. I had the help of the post office fence. I got hold of it, and put my hands on the buildings all along the street, and hobbled home as best I could.

"His Lordship: Had you far to go to get home? A. Not very far, about a block and a half.

"Mr. Kerby: Q. Did you know at that time your ankle was broken? A. No, sir.

"Q. When did you first find out your ankle was broken? A. I doctored myself for two or three weeks, thinking it was a bad sprain, and when my ankle swelled up so badly, and became dreadfully painful, I went to the doctor, and he told me he was quite certain there was a bone broken, and, by the appearance, it was going to be a long time before I would be able to have any use of my foot.

"Q. What was the name of the doctor? A. Dr. Campbell.

"Q. That is Dr. J. F. Campbell? A. Yes, sir.

"Q. And when did you go to see the doctor? A. Well, I doctored myself for a couple of weeks after the fall.

"Q. Yes? A. Because my husband was out of work, and I had a house full of roomers and boarders, and I felt I could not really afford to go to a doctor, and, when I went to him, my condition was very serious.

"Q. Do you know what date you went to the doctor? A. No, he will know that.

"Q. Is there any way of fixing that date?

"His Lordship: He will have the date.

"Mr. Kerby: Possibly the lady can fix that date? A. Really I was so dazed all the time with pain, I did not give any thought to the date, but it was between two and three weeks that I tried to fix up myself.

"His Lordship: Were you in bed during this time? A. Yes, sir, I was on the couch all the time.

"Mr. Kerby: Q. And during that three weeks, or until you went to see Dr. Campbell, were you able to attend to business? A. No, sir, my daughters attended to matters altogether.

"Q. What was your mental condition, the condition of your mind? A. I was half the time crazy with pain, and, in fact, I did not attend to anything because I was not able to, I could not.

"Q. And what was the pain from? A. From my ankle, from the fall, of course, starting from the night I was hurt; I was delirious at times with pain, I could not rest night nor day.

"Q. You know when your daughter came down to see me? A. Yes, sir.

"Q. When you got home, you sent your daughter right back to do what? A. To get my meat, that I was not able to go into the butcher-shop and get—I was in such pain and agony.

"Q. Did you tell her anything about the hole? A. I did.

"Q. What was it you told her to do? A. I told her to look and see where I had fallen. I had stepped into a hole.

"Q. Didn't you tell her to take a measurement of the hole? A. Not that night.

"Q. You did later, how long? A. When I sent down to notify my solicitor, it was after the doctor told me I had a broken bone.

"Q. Anyway when you got home, you told your daughter to go down and see the hole? A. Yes, sir.

"Q. Now, what was your idea in having her look at the hole? A. Because, I wanted to know what I fell on.

"Q. Had you any idea then of making any claim for damages? A. No, sir, I did not feel that way, not until the doctor told me I had a broken bone, and I would be a long time laid up.

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"Q. As a matter of fact, you did not intend to make any claim against the city? A. No, I did not.

"Q. Until the doctor told you you had a broken bone? A. Yes.

"Q. And how long was that after the accident? A. About three weeks.

"Q. Now there is no doubt you could have given notice, but you say you did not intend to make any claim against the city until the doctor told you that your ankle was broken? A. Yes, sir.

"Q. Your ankle had been fractured, and, if you had intended to make a claim against the city, you could have had your daughter notify the city for you? A. Yes, sir.

"Q. There was not anything to prevent your doing that? A. No, sir.

"His Lordship: Any further questions, Mr. Kerby? Let me see if I understand really. You had a very bad accident that evening that you hoped would not turn out to be anything serious? A. Yes, sir.

"Q. And you just doctored yourself, expecting to get better? A. Yes, sir.

"Q. When the doctor came, you found it was a totally different matter? A. Yes, sir.

"Q. And then, of course, you thought you ought to see what your rights were against the city? A. Yes, sir.

"Q. Now, if you had known the serious nature of the accident in the beginning, you could have consulted the solicitor at once? A. I could have, but I wanted to wait until I saw the doctor when I was getting worse.

"Q. I suppose you did not know anything about the necessity of giving immediate notice to the city or anything of that kind? A. No, sir, I did not.

"Mr. Davis: I submit, my Lord, clearly, there should have been notice on that statement.

"His Lordship: It is a pretty cruel statute, and I want to get around it if I can. It is very strange the city does not see its way clear to treat these people with some degree of generosity. Apparently there was a real accident.

"Mr. Davis: "Yes, my Lord, but *O'Connor v. Hamilton*.

"His Lordship: I know the cases. I have been through the mill. Sometimes the city is generous.

"Mr. Davis: We say the city is not at fault in this case. We did not know about this. We fixed it as soon as we found it out.

"His Lordship: They would allow it to be tried on its merits without notice?

"Mr. Davis: I have no authority to waive.

"His Lordship: Perhaps, later on, the city might consent to that, because the statute is one that does not commend itself to many people."

Dr. John F. Campbell, sworn, examined by Mr. Kerby:—

"Q. Dr. Campbell, you were called in attendance upon Mrs. Wallace? A. Yes, sir.

"Q. The plaintiff in this action? A. Yes, sir.

"Q. Where do you practise, Doctor? A. In Windsor. . . . I had to get that swelling out and find out what was the trouble there.

"Q. Now, what was the cause of that swelling? A. The swelling was caused—there was a severe inflammation in the joint, an arthritis very much marked—arthritis in the joint.

"Q. Was it not from walking upon her foot in the condition in which it had been? A. Well, it possibly could do it.

"Q. Now, suppose she had seen a physician, suppose a physician had been called on the day of the accident and had set the ankle, what would have been the result? A. She probably would not have been so long in making a recovery, and there would not have been the swelling that ensued.

"Q. Not so much as has ensued? A. Probably not so much.

"Q. And this swelling and her pain and suffering, to a large extent, were caused by reason of her not having called a physician at the time of her accident? A. Part of it was, and part of it was from injury.

"Q. A great deal from the neglect? A. It is possible considerable of it would be.

"Q. If you had been called on the day of the accident and had attended to the injury and set the ankle, it would have been well long ago? A. Possibly it would.

"Q. And there would not have been any bad effects from it? A. What do you mean—with the ankle?

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"Q. Yes? A. Possibly there would be some, it just depends.

"Q. But not as much as there is now? A. Probably not."

How is it possible upon this testimony, leaving out of consideration for the moment the evidence for the defence, to say that there is reasonable excuse for the failure to comply with the statute-imposed duty the plaintiff owed to the defendants; or, indeed, to find anything else, from the evidence, than that the notice was not given because the plaintiff did not know it was necessary? It is impossible for me to believe that, in the circumstances detailed, a woman 47 years of age, weighing nearly 180 pounds, and the keeper of a boarding and lodging house, would submit to be put, by the defendants' wrong, to great pain, incapacity, and to a considerable money loss, without hitting back, or thinking of hitting back. Such meekness is not consistent with her manner of prosecuting this action, or of men or women in these days. She knew she had sustained a severe injury; she thought it was a bad sprain, and every one knows the common saying, and the truth of it, that "a sprain is often worse than a break." But, in any case, what right had she to take chances, and, losing, to put the consequences on the defendants, instead of giving them the notice the law requires, or taking the consequences herself?

Out of the score or so of cases upon the subject of reasonable cause for want of notice digested in the Current Index of last year and the year before, cases arising under the Imperial Workmen's Compensation for Injuries Act of 1906, Mr. McMaster seems to have been able to find four only that he considered helpful to the plaintiff; and the most helpful thing he could find, in the most important of them, was a statement of the Master of the Rolls in these words: "Speaking for myself, I think the safer ground is to say that unless you can come within either of these two classes of cases, namely, that you can make out that the injury from the accident is latent—not at first apparent . . . or that the accident is apparently so trivial that it would be absurd to expect the workman to give notice of it, I think it is not 'reasonable cause' for not giving notice." That was said in the case *Potter v. John Welch & Sons Limited*, [1914] 3 K.B. 1020, see p. 1031. In falling through a door the workman had fallen on his head and bit his tongue. Immediately after the accident, he reported the matter to his foreman, and his fellow-workman reported it to one of the

directors of the defendant company. The accident happened on the 7th January, and the man continued at his work until the 14th July, and died on the 22nd day of that month. He seems to me to have acted reasonably, he made no claim, but kept at his work, expecting to get well, without losing a day's work, as probably 99 men out of 100 would, but he chanced to be the hundredth—the cut in the tongue set up abnormal cell activity, and the man died quickly of cancer. It was held at the trial that the defendants were prejudiced by the want of notice, but that the man had reasonable cause for not giving notice; and, under the enactment there in question, the claim was not barred. Upon appeal it was held that there was not reasonable cause, and that the defendants were prejudiced, and so the claim was barred.

If questions of fact were to be tried here according to the findings of fact in cases in Great Britain, that case ought to determine this case against the plaintiff; and I may say that in probably three-fourths of the cases collected in the Current Index, to which cases no reference was made, the claims failed because it was not proved that the defendants were not prejudiced.

Perhaps the strongest case that could be cited for the plaintiff is *Hayward v. Westleigh Colliery Co. Limited*, [1915] A.C. 540: but in that case, as put by Lord Parmoor, the only question before the House of Lords was, whether there was "any error in law on which the learned County Court Judge can be put right in the Court of Appeal or in this House. In my opinion there is no error in law of that kind." So that the question there was not whether prejudiced or not or excused or not, but was whether there was any evidence upon which reasonable men could find as the arbitrator found. The first observation that this case calls for is, that it was not contended in it that there was reasonable cause for the want of notice, so it must be taken that there was not, else why go to the House of Lords on the other question, when either found in the plaintiff's favour would have been enough? And so the case is one of the highest authority against the plaintiff, for here, if she fail on either question, she fails altogether. Then the facts of that case were very different from the facts of this case; the injury to the man was a slight abrasion—skin-deep scratch—on his knee; the next day he did not work, the

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next two following days he did, then called in a doctor: a week after the injury, his wife verbally informed the foreman of the colliery of the reason for the man's absence, and two days afterward he died from blood-poisoning, through the scratch on his knee; there was no evidence of any kind of actual prejudice to the defendants: but it seems to have been admitted or taken for granted, as I have said, that there was no reasonable cause for the want of notice. As I have also said, if that case could be held to govern this, then this action was rightly dismissed for failure to give the notice.

But, not only is no case decided upon its facts only an authority binding in any other case, but also the enactment in question here and the enactment in question there are widely different in purpose and in words: the enactment there in question was passed for the benefit of workmen, to give them a right of action and a remedy for injuries sustained in the course of their employment, and no one can say, with any approach to the truth, that the House of Lords is not fully obeying the injunction, the law's injunction, to give to the enactment such a liberal construction as will best attain its object—the benefit of workmen physically injured, as I have mentioned.

The enactment here in question was passed, as I have said, for the protection of municipal corporations from actions connected with their statute-imposed duty to keep the highways in repair; and was separately passed long after the duty to repair the highways was imposed; and perhaps a fair indication of the difference between the enactments is afforded in the fact that the plaintiff in the one is relieved from the effect of his default for either reasonable cause or absence of prejudice; whilst under the other only for reasonable excuse and absence of prejudice. So too it is essential to bear in mind that under the Imperial enactment the notice is to be given as soon as practicable after the accident, whilst here there is the hard and fast rule of seven days after the happening of the injury, in urban municipalities, and thirty days in townships and counties; so that the important element of practicability involved there is excluded here, making a very wide difference upon the questions here involved.

Here, I can find no excuse, and the trial Judge, notwithstanding all his sympathy openly expressed, could find none: and upon the

other ground the city's engineer testified to actual prejudice, and to a regular and reasonable way of dealing with all such cases, which was impossible in this case for want of notice. Then the evidence of the actual condition of the sidewalk at and about the time when it is said the accident happened is meagre and unsatisfactory; it might, and indeed must, under the defendants' method of dealing with such claims, have been made plain had notice been given, as it ought in fairness to have been given, the next day. The law allowing a claimant seven days does not prevent an immediate notice. The result might have been that the plaintiff would have been settled with at once or the discovery of a good defence to the action; at the least, the failure to give it may have caused all this litigation.

And in regard to the injury, how is it possible to say that the defendants are not prejudiced in their defence? They might and should have had, with the plaintiff's consent, a careful surgical examination of her injury, and at the very least have saved the woman and themselves from much that they are now asked to pay for.

If it be a true claim, if the plaintiff were really injured at the time she says she was, an immediate notice would have prevented litigation to have that point determined, and the then condition of the sidewalk would alone have gone a long way towards sustaining her assertion that there she was hurt.

To say that the injury seemed trivial is to say that the plaintiff and her daughter and physician have all testified to that which is untrue: to say that an accident which caused the immediate and continuous, for nearly a month before notice given, effects these witnesses tell of—agony of pain causing delirium, complete inability to work, and all the other distressful conditions related by them—could have seemed trivial to any one, is assuredly trifling with the facts; the very facts upon which the plaintiff's damages have been assessed—though irregularly assessed if not by consent, at \$600—shew the entire absence of anything like triviality.

So too the suggestion of Mr. McMaster that her injury was "latent." Her assertion, supported by the testimony I have referred to, is that all that agony and incapacity was caused by the accident, and began immediately and were continuous day and

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night up to and long after the notice was given. It would be difficult to imagine any injury less undiscovered, more patent.

The fallacy of Mr. McMaster's suggestion is very obvious: it confuses the cause of the suffering with the injury. The law is not absurd enough to require that notice shall be given technically of the effect of the injury; all that is required is notice that an injury has been sustained—in this case, that the plaintiff's leg was injured in being thrown down by stepping in a hole in the sidewalk. If one had to tell the effect, one would need to have more knowledge than any physician, for no one is always free from error in this respect. Can it be said that a man's illness is latent because he supposes it to be bronchitis and in truth it is laryngitis? Why any more so when the agony is supposed to come from a sprain, though it really comes from a fracture not preventing locomotion; a sprain, the consequences of which may be worse than those of a fracture, and, perhaps, or likely to be when it causes such immediate and continuous great pain and suffering?

If one could wait until he knew accurately the effect of the injury, notice need seldom be given. The plaintiff knew of her *injury*, and, for the purposes of the Act, could just as well have given the notice it requires immediately after the accident as at any other time.

I decline to be a party to any decision that tends to wipe out the protection the Legislature has given municipal corporations, even though that protection may sometimes defeat a claim which but for it would have been a just one. It will be time enough to settle these questions according to our several ideas of "natural justice" when the Legislature puts that burden upon us: a thing extremely unlikely, and a thing which would be as unwise as unlikely, in view of the great variety of "natural justice" which such a law would discover.

I would dismiss the appeal, and affirm the direction for dismissal of the action, basing it on both grounds; and so, to some extent, differ from the trial Judge.

RIDDELL, J.:—The plaintiff, a woman of mature years, fell on the streets of Windsor, on the evening of Saturday the 13th February, 1915, and suffered severe injury—a fracture of the fibula or small bone of the leg and a "corner off" the lower end of the tibia or shin-bone.

She brought her action against the city; it was tried by and before Mr. Justice Middleton without a jury, at Sandwich, on the 8th and 9th October, 1915. The learned Judge found that she would be entitled to damages to the amount of \$600 had it not been for her failure to deliver the statutory notice required by sec. 460 (4) of the Municipal Act: and dismissed the action. The plaintiff now appeals.

The learned Judge holds, and correctly, that the plaintiff was not "in any such condition as to be incapable of considering her situation except as a sufferer," and goes on to say: "What happened was that the plaintiff's foot was undoubtedly seriously injured. The fibula was cracked or broken, but not so that the pieces separated. On the opposite side a very small portion of the cartilaginous substance was broken. The plaintiff went home unaided. She ought to have laid herself up and had the injury properly taken care of. Instead of that, she did not seek medical aid until the 11th March, and then the limb was much inflamed and very painful."

After discrediting the daughter, the learned Judge continues: "She did not realise that she was seriously injured; she did not know the statute nor the necessity of giving notice. Had she realised that she was seriously injured and known of the statute, there was nothing to prevent the notice being given."

This, I think, is a fair statement of the plaintiff's condition. I would add to that, however, that the plaintiff did not know that she had anything but a bad sprain until she consulted Dr. Campbell on the 11th March; that she supposed her domestic treatment with vinegar, etc., would bring about a cure; and that until she found that the bone was implicated, she had no intention or thought of looking to the city for damages. When she found how serious her injuries were, she thought of a claim on the city, saw her solicitor, and a notice was served on the 12th March.

In order to avoid the effect of non-service of notice within seven days, the Court or Judge must be of the opinion that (1) there is reasonable excuse for the want of the notice and (2) the corporation was not thereby prejudiced in its defence: sec. 460 (5). My learned brother holds that the corporation was not prejudiced, but that there was no reasonable excuse for not giving notice in time.

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Assuming, as on this evidence we must assume, that, during all the time before the expiration of the statutory period, the plaintiff believed herself to have received but a comparatively trifling injury which would yield to fireside remedies, and for which she would not think of claiming damages from the city—I am of opinion that there was a reasonable excuse for the want of notice.

Not much if any assistance can be had from the cases in our own Courts such as *Armstrong v. Canada Atlantic R.W. Co.* (1901-2), 2 O.L.R. 219, 4 O.L.R. 560; *O'Connor v. City of Hamilton*, 8 O.L.R. 401, 10 O.L.R. 529; *Morrison v. City of Toronto*, 12 O.L.R. 333; *Anderson v. City of Toronto*, 15 O.L.R. 643; *City of Kingston v. Drennan*, 27 S.C.R. 46—each case must be decided on its own facts, and what is a reasonable excuse in one instance will not necessarily be such in another. It is not contended that any of the circumstances which have been held in our Courts to give a reasonable excuse exist here.

We are referred to some of the many cases in which what was a “reasonable cause” for omitting to give the statutory notice required by the Employers’ Liability Acts was considered.

In *Tibbs v. Watts etc. Limited* (1909), 2 B.W.C.C. 164, a barge-man strained himself lifting coal—nothing was apparent at the time, but an aneurism had in fact been caused, which was discovered by the doctor three months after. Cozens-Hardy, M.R., says (p. 165): “It is impossible to think that every workman must give notice of every strain received, the effects of which are not apparent”—and the default in giving notice was excused. But there, “nothing was apparent at the time,” and the injured man continued to work till he was medically examined.

In *Eke v. Dyke* (1910), 3 B.W.C.C. 482 (C.A.), the workman was said to have died from some form of poisoning caused by the condition of the drain he was working in. No notice was given or application made, but that was excused, as “neither of the doctors, and I think nobody, was at all prepared to say at that time that there had been an accident within the meaning of the Act.”

In *Moore v. Naval Colliery Co. Limited* (1911), 5 B.W.C.C. 87, a miner, suffering with a disease of the eye, believed that a rest above ground would cure him: it did not, but the disease became worse. The County Court Judge held this no excuse: but the

Court of Appeal reversed this finding (Farwell, L.J., holding that whether a particular set of facts constitutes reasonable cause within the Act is a matter of law). Cozens-Hardy, M.R., says (p. 92): "In the case of a man . . . whose good faith is not impugned, who is told, 'A few days above ground . . . will probably make you all right,' who does not immediately make a claim against his employers . . . but believes the change, . . . will set him right, and, when he finds it does not, . . . goes to the certifying surgeon . . . and then immediately makes his application, I should be very sorry indeed to hold that that was not a reasonable cause for not having entered his application sooner." These two cases are not of much assistance.

Then comes *Hoare v. Arding & Hobbs* (1911), 5 B.W.C.C. 36 (C.A.)—a saleswoman in a shop received a shock from a fire which burnt part of the shop. Thinking she was suffering from temporary nervous derangement only, she gave no notice of the accident, and made no claim for compensation. She was attended by medical men during the whole time, but they thought there was nothing seriously the matter with her, and that she was suffering only from hysteria. Six months after, it was found that she really had disseminated sclerosis, an incurable disease, which permanently incapacitated her for work: and two months thereafter she gave notice and made a claim. The County Court Judge held this reasonable cause, and his decision was affirmed by the Court of Appeal. Fletcher Moulton, L.J., at p. 38, says: "This lady, not wishing to make a claim for trifling things, imagined that for practical purposes she had not received an injury from the shock that was a proper subject for a claim. Then in August, she, for the first time, found out it was a serious disease. That is more than six months from the date of the accident. The neglect to make a claim was due to a reasonable cause." Cozens-Hardy, M.R., and Farwell, L.J., agreed.

In *Breakwell v. Clee Hill Granite Co. Limited* (1911), 5 B.W.C.C. 133, an elderly cripple met with an accident—when trying to lift a heavy stone, he "hurt himself." He did no more work that day, but walked home without assistance. He remained in bed a few days, and was so ill he could not go to see his club doctor; but he saw the doctor five days after the accident; the doctor did not tell him he was in such a state that he could not work

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again—nor did the man think he was in such a condition. Afterwards he went to Liverpool and entered a hospital, but got no better and came home, making a claim six months after the accident. He had been suffering from heart disease, and this was accelerated by the accident so that he never could work again, as he learned for the first time in Liverpool. He was afraid, if he made a claim, that the insurance company would prevent his re-employment—and “he put off giving notice of the accident until he found that he was so injured by the accident that he would never work again.” This was held a reasonable cause by the County Court Judge and the Court of Appeal.

In *Fry v. Chellenham Corporation* (1911), 5 B.W.C.C. 162, 105 L.T.R. 495, a workman, on the 15th February, fell and hurt his knee; he continued to work till the 24th November, when, having a pain in his knee, he saw a doctor. The doctor found that an operation was necessary, and on the 18th December he went to the hospital and was operated on—notice being given the previous day. “From February to November he had suffered no inconvenience at all” (*per* Buckley, L.J., in *Webster v. Cohen Brothers* (1913), 6 B.W.C.C. 92, at p. 98). This was held reasonable cause.

In *Egerton v. Moore* (1912), 5 B.W.C.C. 284, [1912] W.C. & I.R. 250, [1912] 2 K.B. 308, a navvy in July fell and struck his breast on the top of his pick: he was helped up by his mate and shortly after resumed work. He told his employer that he could not go to work; but, expecting to be all right in a few days, he gave no formal notice. Five days afterwards he started working for another employer and worked steadily till February, when he noticed a tubercular abscess which he attributed to the fall on the end of his pick: this got worse and obliged him to stop work, and go to the hospital in May. No notice was given for almost a year after the accident: the County Court Judge and the Court of Appeal thought that there was no reasonable cause for this default.

In *Refuge Assurance Co. Limited v. Millar* (1911), 49 Sc. L.R. 67, 5 B.W.C.C. 522, an insurance agent fell on his rounds and injured his left side, shoulder, and arm—this was on the 9th May. Within two days he told the manager, and again on the 8th June, when he asked for a week’s rest, and was told he had better

resign. He did resign, his service terminating on the 29th June; from that time he was totally incapacitated with paralysis of the left side of his face and pain on the left side of his body, but still he thought his injuries only slight; on the 6th September, he consulted a doctor and found his real condition; he gave notice on the 12th September. The Sheriff-Substitute found that there was reasonable cause for the delay in notice, and the Court of Session affirmed this judgment. The Lord President, with whom the other two Judges concurred, says: "It seems to me . . . that there was a reasonable excuse, because I think it was quite probable that the workman was not aware of the seriousness of his injury, and that, when he did come to know of the seriousness, he did give notice."

In *Webster v. Cohen Brothers*, 6 B.W.C.C. 92, [1913] W.C. & I.R. 268, a workman met with an accident on the 3rd April, his right leg getting twisted under him. He was in great pain, but kept on working, expecting every day that it would be better; it did not get better, but on the 1st June he became incapacitated from working altogether. He gave formal notice on the 3rd June. The County Court Judge held that, as till the 14th June the injury did not prevent the workman from working, and as he reasonably believed that it would not, and that no occasion for making a claim for compensation would arise, there was a reasonable cause for the omission—but the Court of Appeal did not agree in this conclusion. Cozens-Hardy, M.R., says (p. 96): "If a man abstains from giving notice of an accident which is daily causing him pain and which is well known to him . . . because he does not intend to make a claim, that is not a reasonable cause for the failure to give notice." Buckley, L.J., during the argument (p. 94) says: "There appear to be two classes of cases: those where the workman says: 'If I do not get worse I shall not have to give notice;' and those where he says: 'If I do not get better I shall have to give notice, but I expect I will get better and so I do not give notice.'" And in giving judgment (p. 97) he says: "We must distinguish between two different sets of facts: in the one the workman says, 'If things continue as they are, I shall never require to give notice of any claim for compensation;' that might be reasonable cause for not giving notice. The other state of facts is this: the workman says to himself, 'I have had an accident, the results of which are

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serious, but I think they will alter for the better. I shall not give my employer notice of the accident, because if, as I hope, the results alter for the better, I shall never have to give notice of a claim for compensation at all.' That is not reasonable cause for the failure to give notice of the accident." Hamilton, L.J. (p. 101), says: "It is not reasonable cause for a workman failing to give notice of his accident if he says, 'I do not think I shall want to make a claim; I am sanguine about my recovery, and therefore I will not give notice of my accident.'"

In *Ellis v. Fairfield Shipbuilding Co. Limited* (1912), 6 B.W.C.C. 308, [1913] W.C. & I.R. 88, 50 Sc. L.R. 137, a workman was injured by accident on the 1st June; he continued at work till the 5th August, though he suffered pain in his neck and shoulder, which he attributed to the accident; he then saw a doctor, who diagnosed the complaint as muscular rheumatism; the workman kept at work till the 11th November, and then left and consulted another doctor, who diagnosed a severe strain of the neck ("much the same" says the Lord President "as muscular rheumatism"). This doctor treated him for strain of the neck till the 3rd December, when another doctor was consulted, who made out partial dislocation of the spine, and recommended removal to an infirmary. The workman gave formal notice on the 30th January—the Sheriff-Substitute held no reasonable cause proved for the delay: but this decision was reversed by the Court of Session. The Lord President (6 B.W.C.C. at p. 316) points out that, while the workman believed his condition due to the accident, he did not know his true condition, "because he was suffering from something he did not know anything about . . . until he was told on the subsequent December 13:" then (p. 317) he finds as the result of the cases, "if a man has an accident, and honestly believes at the time that nothing serious has happened to him, and therefore, not conceiving that he has a good claim against his employer, makes no claim, but it afterwards turns out that he has made a mistake in fact and really had been injured, that may be . . . reasonable cause for his not making the claim . . . or not giving notice of the accident . . ." The other three Judges concurred.

In *Sanderson v. Parkinson & Sons Limited* (1913), 6 B.W.C.C. 648, a painter lad fell ill on the 15th July, and left off work; on

the 13th August, he consulted a doctor, who sent him to bed, from which he did not get up till December—then the doctor told him to leave everything alone; he then made an oral claim, saying that the doctor thought this lead poisoning—on the 11th February, formal claim was made, and on the 13th February a certificate obtained that he was suffering from lead-poisoning, the disablement commencing in July. The County Court Judge held no prejudice and delay in notice, &c., occasioned by reasonable cause: the Court of Appeal gave no judgment on the last point, but held that the employers were not prejudiced—this is not of value upon the present inquiry.

In *Clapp v. Carter*, 7 B.W.C.C. 28, [1914] W.C. & I.R. 80, [1914] 3 K.B. 1020, a workman met with an accident, falling on his head: he remained away from work three days and then returned and continued his work for about six months, continually suffering from headaches during the time and being compelled at times to quit work because he felt so ill—then for three months his mind became actually unbalanced, and, after two months more, formal notice was given. The County Court Judge found that the reason no claim was made was that “he hoped and believed that the headaches would soon pass away and that he would recover.” The County Court Judge found reasonable cause: but the Court of Appeal reversed this finding. Cozens-Hardy, M.R., says (7 B.W.C.C. at p. 33): “I think the safer ground is to say that unless you can come within either of these two classes of cases, namely, that you can make out that the injury from the accident is latent, not at first apparent . . . or that the accident is apparently so trivial that it would be absurd to expect the workman to give notice of it, I think it is not ‘reasonable cause’ for not giving notice.” Evans, P., and Eve, J., adopt as their rule *Webster v. Cohen Brothers*, 6 B.W.C.C. 92, *ut supra*.

In *Thompson v. North-Eastern Marine Engineering Co.* (1914), 7 B.W.C.C. 49, [1914] W.C. & I.R. 13, a workman fell on his elbow, causing some temporary pain, which he himself relieved by topical applications. He was in no way incapacitated and continued on his old work. Three months later, he found increasing loss of power and wastage of flesh in his arm: a surgeon examined with the Xrays and found a fracture in the elbow of long standing, and this he attributed to the accident. The

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workman gave notice a few days later: the County Court Judge held a reasonable cause shewn, and the Court of Appeal sustained the decision. Cozens-Hardy, M.R. (7 B.W.C.C. at p. 51), considered the case one of latent injury, and Evans, P., and Eve, J., agreed.

In *Zillwood v. Winch* (1914), 7 B.W.C.C. 60, [1914] W.C. & I.R. 87, a bricklayer, on the 17th October, went to lift an unusually heavy bucket, and felt a "rick" on his side in the abdomen—the pain passed away, but a lump appeared in the place he had felt the pain. He continued to work every day and bathed the lump every night—it seemed to get better, but early in January he felt the pain and lump again at work, and once he all of a sudden collapsed. The pain and lump disappeared and reappeared, and the doctor advised a truss. He got one, but he could not do his work so well because of the continual stooping required: about the middle of January he gave notice: the County Court Judge held that there was reasonable cause, and this was sustained by the Court of Appeal. Cozens-Hardy, M.R., says (7 B.W.C.C. at p. 64): "The learned Judge, who has seen the witnesses . . . said, 'that when the accident happened the applicant, as a reasonably minded man, did not know that he was suffering from any injury which could lead to incapacity, total or partial. Not having surgical, medical, or anatomical knowledge, he was not aware, and had no reason to believe, that he was suffering from rupture' . . . He knew that this lump which he felt was due to the accident, but thinking that it was a mere rick, and thinking that the fomentations which he applied would produce a good result, he did not take further notice." Evans, P., and Eve, J., concurred in the decision that this was reasonable cause.

Ing v. Higgs (1914), 7 B.W.C.C. 65, [1914] W.C. & I.R. 84, is a decision on prejudice by delay, and I do not set out its facts here.

In *Haward v. Rowsell & Matthews* (1914), 7 B.W.C.C. 552, [1914] W.C. & I.R. 314, a butcher's canvasser, one morning in September, made a slip on his wheel and was hurt—he went home and rested two days, when he returned to work, though still suffering slightly from the results of the fall—and the pain and swelling continued. By the 26th December, the pain had in-

creased, and he consulted a surgeon, who found cancer and removed a cancerous gland—a second operation became necessary about three weeks thereafter, and another on the 3rd February. By that time the disease had spread and the case had become hopeless—the man died. The County Court Judge held that there was reasonable cause for not giving a notice till the 26th December, in that the injury was latent. Cozens-Hardy, M.R., says (7 B.W.C.C. at p. 557): “It was not until December 26 . . . Boxing Day, that the man or anybody else was aware of the serious state of things from which he was suffering. . . . It is quite right to say . . . that there is reasonable cause for not giving notice before Boxing Day.” Swinfen-Eady, L.J. (p. 559): “There was reasonable excuse for not giving it until December 26.” Pickford, L.J., concurred.

In *Potter v. John Welch & Sons Limited*, 7 B.W.C.C. 738, [1914] W.C. & I.R. 607, [1914] 3 K.B. 1020, a sliding door fell on a workman's head, causing a jagged tooth to bite through his tongue. The wound bled a good deal and there was considerable pain, but the man did not quit work. The wound on the head soon healed, but, a fortnight or so after the accident, he experienced trouble with his tongue so that he could hardly eat. This continued for some time, and at length, some six months after the accident, he became totally incapacitated; his doctor found “that the mischief caused by this jagged tooth going through the tongue had so irritated the tongue and produced such inflammation that he developed cancer, from which he died.” No notice was given; the trial Judge, Channell, J., held this omission excused, but the Court of Appeal did not agree. Cozens-Hardy, M.R., says (7 B.W.C.C. at p. 751) that the injury from the accident was not latent “because there was not only a wound in the head but also an actual hole through the man's tongue, caused by a jagged tooth.” Swinfen-Eady, L.J., and Pickford, L.J., concurred. In this case the whole of the injury was apparent and known to the sufferer—what he was ignorant of was the result which was to follow.

In *Snelling v. Norton Hill Colliery Co.*, [1913] W.C. & I.R. 497, a workman in a colliery injured his hand, he thought a mere scratch, and went to work the following two days. The next day, Sunday, the hand became painful and began to swell, but

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on Monday he went to work again—on Tuesday he saw a doctor and found he had septic poisoning; an operation did good, and six days after this he gave written notice—the County Court Judge found that there was no reasonable cause for not giving notice as soon as he found the real condition of his hand: and the Court of Appeal agreed with him.

In *Grime v. Fletcher*, [1915] 1 K.B. 734, a workman injured his eye, and suffered great pain. It was alleged that this injury produced a state of insanity which caused the workman to commit suicide. The County Court Judge held that there was no reasonable cause for not giving notice, and this decision was affirmed by the Court of Appeal. Here, as in some other cases, the sufferer knew the full extent of his injury; he probably did not know that the injury might have such serious results (if in fact the insanity was the result of the injury and the suicide the result of the insanity, which was more than doubtful).

It may be well to examine the other cases in England and Scotland so far reported in reports which have reached us.

In *Nichols v. Briton Ferry Urban District Council*, [1915] W.C. & I.R. 14, a stoker, in attempting to prevent a barrow from falling, was ruptured; he felt the lump within two hours of the strain, but no notice was given for three days—the County Court Judge and the Court of Appeal held that there was no reasonable cause for the omission to give notice as soon as practicable after the accident.

In *Wassall v. James Russell & Sons Limited*, [1915] W.C. & I.R. 88, the workman, on the 24th September, hurt his finger—but kept on working till the 27th September at 10 a.m., when he had to quit, as he could not hold the hammer. On the 29th September, he saw a doctor, who found the finger in a septic condition, and the workman then gave notice. It was held by the County Court Judge and the Court of Appeal that from and after the 27th September at 10 a.m. there was no reasonable cause for omission to give notice.

In *Taylor v. Nicholson & Son (Leeds) Limited*, [1915] W.C. & I.R. 42, a workman cut his finger on the 27th February; on the 10th March, when the cut was healed over, he met another accident and broke it open. On the 12th March it looked bad, and on the 19th March the doctor found an open sore and conditions

indicating blood-poisoning—the man died of blood-poisoning on the 27th March, and notice was given on the 1st April. It was held by the County Court Judge and the Court of Appeal that at least from the 19th March there was no reasonable cause for delay.

In *Fox v. Barrow Hematite Steel Co. Limited*, [1915] W.C. & I.R. 321, a miner was struck on the eye by a piece of coal—he stopped work, washed his eye, and remained away from work—on the fourth day, he saw a doctor, who hoped to save the eye. Three days thereafter, notice was given; the doctor's hope was disappointed, in two more days the eye became septic, and the workman lost the use of it. The County Court Judge thought this "an injury to the eye which may result in the loss of it," and that there was no reasonable cause for not giving notice the day following the accident, when the workman made up his mind to stay away from work—the Court of Appeal agreed. Warrington, L.J. (p. 325), considers the case to come within the second of Lord Justice Buckley's cases in *Webster v. Cohen Brothers*, the case in which the workman says to himself, "I have had an accident which is serious, but I expect it will alter for the better."

In *Plumley v. Ewart*, [1915] 4 W.C. & I.R. 317, there was no appeal on the question of reasonable cause, and I do not extract the facts.

In *Flood v. Smith & Leishman*, [1915] W.C. & I.R. 212, a workman injured his finger, making a small wound near the nail of the middle finger of his left hand: nine weeks thereafter, it began to swell; he went to an infirmary and received treatment for some four weeks, and three weeks thereafter gave notice. The finger had been treated as a septic finger, but the man had an obscure constitutional complaint which might be dormant for some time and be awakened to activity by such an accident. The arbitrator and the Court of Session considered that he did not realise the seriousness of his injuries at the time, and that that was a reasonable cause for failing to give notice. Lord Mackenzie (p. 218) says: "It is found that he was afflicted with a constitutional complaint which may lie dormant for a time and be awakened into activity by such an accident . . . an obscure constitutional disease. . . . One is not surprised that the workman should not realise the nature of the injury . . . I

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take as a crucial finding in fact that the serious nature of the injury did not fully appear until the month of March. . . . He went into the infirmary, and . . . it was not until the last week of March that he became convinced that his injury was of a serious nature."

It seems to me that the fair result of the English and Scottish cases is that, where an accident turns out to have more serious results than were at first anticipated, and notice is deferred until the seriousness of the results has become apparent, the want of notice is not to be excused if the full extent of the injury—of the lesion—is apparent or known, although the results of such injury or lesion may not be known. Such is the case in *Moore v. Naval Colliery Co. Limited*; *Fry v. Cheltenham Corporation*; *Webster v. Cohen Brothers*; *Egerton v. Moore*; *Clapp v. Carter*; *Potter v. John Welch & Sons Limited*; *Grime v. Fletcher, &c.*

But, if the full extent of the injury or lesion be not apparent, a failure to give notice is excused until it is discovered—or at least until it should have been discovered—till that time the injury is "latent." Such is the case in *Tibbs v. Watts etc. Limited*; *Hoare v. Arding & Hobbs*; *Breakwell v. Clee Hill Granite Co. Limited*; *Refuge Assurance Co. Limited v. Millar*; *Ellis v. Fairfield Shipbuilding Co. Limited*; *Thompson v. North-Eastern Marine Engineering Co.*; *Zillwood v. Winch*; *Haward v. Rowsell & Matthews, &c.*

The present case falls within the latter class—if it be a matter of law, as is said in some of the English cases, I think the law gives the plaintiff a reasonable excuse: if it be a matter rather of fact or of mixed law and fact, as I prefer to think, the same result should follow.

I have had some trouble with the other branch of the case, the absence of prejudice to the defendants from the notice not being served. The learned trial Judge has found this in favour of the plaintiff, and a perusal of the evidence does not satisfy me that he is wrong.

I would reverse the judgment and direct judgment for the plaintiff for the amount found by the trial Judge, with costs here and below.

LENNOX, J.:—Taking up the main point to be considered upon this appeal—that is, was there reasonable excuse within the mean-

ing of sub-sec. (5) of sec. 460 of the Municipal Act, R.S.O. 1914, ch. 192, for non-compliance with sub-sec. (4), requiring notice of the claim to be given to the corporation within seven days of the happening of the injury?—I can, for the most part, confine myself to the facts found by the learned trial Judge (setting out portions of the judgment of MIDDLETON, J., *supra*.)

The learned Judge assessed the damages, contingently, at \$600, and by doing this, and stating his conclusions of fact and law with characteristic clearness, has greatly facilitated this Court in dealing with the questions argued upon this appeal.

With very great respect, I am of opinion that the learned Judge erred in concluding that “the case is entirely governed by *Anderson v. City of Toronto*, 15 O.L.R. 643.” On the contrary, it does not appear to me that the decision in the *Anderson* case in any way touches the question to be decided here, except possibly as a matter of reasoning, by the process of exclusion. In the *Anderson* case the judgment of the learned Chancellor upon the question of excuse, after finding that the defendant was not prejudiced, is contained in three sentences: “A sufficient excuse arises if the nature of the injury is such as to cause the plaintiff to become for the time being incapable of considering his situation except as a sufferer. On that ground proceeds *Morrison v. City of Toronto* (1906), 12 O.L.R. 333. The injury here was a sprain to the foot, which, no doubt, occasioned great bodily suffering; but there is nothing to shew that the patient was so affected and prostrated that he was physically or mentally incapacitated from giving notice, or directing that it should be given.”

In a manner which I cannot hope to emulate, the Chancellor epitomises the principle of the decision in *Morrison v. City of Toronto*, and gives effect to it in a case governed by the same principle. Facts and conditions may differ as blades of grass or in marked degree, but the principle determining the inquiry must always be: does the evidence disclose a reasonable excuse? It matters not what its character is, so that it is a reasonable excuse. A plaintiff may have one valid excuse or many or none. In *Morrison v. City of Toronto* and *Anderson v. City of Toronto*, there was only one possible excuse and of the same character in each case—mental and physical inability to give the notice, good cause if established, and the evidence established its existence in

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the one and non-existence in the other. Neither case, of course, is authority for saying that physical or mental incapacity is the only excuse, or that a plaintiff failing to shew an excuse of this character may not have a valid excuse of another character. The tacit assumption of the contrary of this, if I may say so, with great respect, is the fundamental error in the judgment in appeal. The excuse here, if any the plaintiff has, is not that she was mentally or physically incapable of giving notice, but an excuse of an entirely different character, and which does not appear to have been considered, and possibly was not urged, at the trial. The plaintiff was certainly in bad condition mentally and physically, but I unhesitatingly accept the conclusion of the learned trial Judge that it was not of such an extreme character as (in itself) to relieve the plaintiff from the obligation of giving notice. He finds, and it was open to him to do so upon the evidence, that "the plaintiff was not in any such condition as to be incapable of considering her situation except as a sufferer;" and, if this were all, then, although the circumstances are different, as they must always differ, yet the principle of the decisions in the two cases referred to must be applied, and the plaintiff would be without remedy. It was upon a consideration of this character of excuse, and on this alone, that the learned Judge came to the conclusion that the plaintiff's action is barred by the statute.

But this is not all, and this is not the excuse available to the plaintiff, if any she has. Her excuse is that she did not know the nature of the injury, or, to be more specific, did not know that the ankle was fractured, or that she had sustained an injury of a serious and permanent character, and consequently did not contemplate making any claim for damages until the 11th March, when she first consulted a doctor. The trial Judge says: "The plaintiff went home unaided. She ought to have laid herself up and had the injury properly taken care of. Instead of that, she did not seek medical aid until the 11th March, and then the limb was much inflamed and very painful;" and, after referring to the daughter's evidence, and the impression it created as not favourable, continues: "The plaintiff's own version impressed me much more. She says she did not realise that she was seriously injured; she did not know the statute nor the necessity of giving notice. Had she realised that she was seriously injured and known of the statute, there was nothing to prevent the notice being given."

I think this is entirely correct as a statement of fact as far as it goes. In view of the basis upon which the learned Judge was disposing of the question of excuse, it was only necessary to refer to this circumstance in general terms. Ignorance of the statute is, of course, no excuse.

But the real excuse, and the only one open to the plaintiff in the circumstances of this case, is that she sustained a latent injury, and could not be expected to give notice earlier than she did. This has not been considered, or at all events is not dealt with, in the judgment. Mrs. Wallace was not longing for a lawsuit. In this respect she appears in commendable contrast with many litigants. She was able to walk home without anybody assisting her. Had she been the joyful recipient of an accident and a hunter for damages, so well and unfavourably known to the Courts, she would have saved this Court and herself a lot of trouble; she would have called upon a lawyer on her way home. But she was only an honest, hard-working woman, and preferred "to bear the ills she had," or thought she had, and doctor herself into health again. She had no reason to believe at the time that it was anything more than a temporary, though painful, injury; and, as she says, she did not feel that she could afford to have a doctor, and set to work to make the best of her misfortune. Instead of getting better, she gradually became worse. If the law bars her right of action, it is in a sense to be regretted; but, still, it is for the Courts to administer the law rigidly, as they understand it, without hesitation.

A few paragraphs from the plaintiff's evidence will help to make clear how much she knew of her injury, and her attitude until the doctor enlightened her. [Quotations from the evidence of the plaintiff: see the judgment of MEREDITH, C.J.C.P., *supra*.]

The plaintiff knew she was injured in a way to cause her inconvenience and pain, but still did not know what had happened to her; she knew only of a temporary, trivial injury, and lived in this belief. But, as she says, "When the doctor came, I found it was all different;" she realised what the wrench had done and what she was in for, and acted without delay. How could she know? Dr. Campbell immediately discovered that there was something very serious, a broken bone, and that it would be a long time before she would have the use of her foot, but it was only

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with the aid of an expert and the Xrays that the specific latent injury was revealed. If the injury is obvious, if the plaintiff knows what the injury is, time runs from the date of the accident, and that the sufferer cherishes an unfounded expectation of speedy recovery is no excuse for delay: *Webster v. Cohen Brothers*, [1913] W.C. & I.R. 268. But both in accident and industrial disease cases, latent injury is necessarily an excuse.

I am clearly of opinion, both on reason and authority, that the plaintiff has shewn a reasonable excuse for delay in giving the statutory notice: *Tibbs v. Watts etc. Limited*, 2 B.W.C.C. 164; *Moore v. Naval Colliery Co.*, [1912] W.C. & I.R. 81; *Hoare v. Arding & Hobbs*, 5 B.W.C.C. 36; *Stinton v. Brandon Gas Co.*, [1912] W.C. & I.R. 132. These cases are decided under the English Workmen's Compensation Act, 1906, ch. 58, sec. 2. The wording is very much the same as the provision of our Municipal Act above referred to. The notable difference is that notice of the injury or accident and the making of a claim for compensation are clearly separate matters, and there is no definite time for giving the notice; it is to be given "as soon as practicable" after the happening of the injury; and for our "reasonable excuse" the Imperial Act has "reasonable cause." There is also this significant difference, that under our Act it must be shewn that there was reasonable excuse "*and that the corporation was not thereby prejudiced in its defence,*" but in the Imperial Act it is disjunctive and alternative. These differences, important in some respects, cannot affect the principle recognised in the long line of cases shewing that latent injury is a reasonable cause or excuse for delay. I shall only refer to two or three other cases.

The most recent that I have any knowledge of is *Flood v. Smith & Leishman*, [1915] W.C. & I.R. 212, a judgment of the Scottish Court of Session. On the 2nd December, 1913, the plaintiff, a stableman in the defendants' service, slightly injured one of his fingers while acting in the course of his employment. He mentioned it to his wife, but continued at his work until the 22nd February, 1914, when his finger began to swell, and he was in an infirmary for about four weeks and up to the 1st April. Verbal notice of the accident was given to the foreman on the 4th December. This was not communicated to the employer. The plaintiff did not regard the injury as serious at that time.

On that day, however, he consulted a doctor, who treated him for septic poisoning. He went to another doctor in March, and it was he who sent him to the infirmary. The serious nature of the injury was not known until then. The notice of claim was lodged on the 22nd April. The Sheriff-Substitute found that the notice was not given "as soon as practicable," and the defendants were prejudiced by the delay. These findings of fact were not disturbed. It was also found that the plaintiff was the victim of an obscure constitutional complaint, and supposed that this was wakened into activity by the accident. In concluding his judgment the Lord President said (p. 216): "That a man who is labouring under an error as to the seriousness of the injury he has suffered has reasonable cause for not giving the notice enjoined by the statute is a proposition I am prepared to affirm." The other Lords of the Court of Session concurred, two of them also giving written judgments.

In *Thompson v. North-Eastern Marine Engineering Co.*, [1914] W.C. & I.R. 13, the injury caused the workman pain in his elbow, but he was able to work. Some months afterwards he suffered from loss of power in his arm, and consulted a doctor. He was not attributing this to the accident, but the doctor found the arm fractured, and that this was the cause of loss of power. The fracture was the result of the accident, but the plaintiff did not know of its existence until informed by the doctor. Held, that the injury being latent, the notice was given as soon as practicable and there was reasonable cause for the delay.

This decision suggests, as does the present case, that what is a reasonable excuse for one plaintiff may not be for another. If the plaintiff in the *Flood* case had been a distinguished physician, instead of an illiterate labourer, he might have been presumed to know and appreciate his condition.

In *Egerton v. Moore*, [1912] W.C. & I.R. 256, in the English Court of Appeal, the workman failed, but the doctrine that latent injury excuses the want of notice until the sufferer has knowledge of his condition is clearly recognised. The accident occurred on the 21st July, 1910. In the opinion of the Court, the plaintiff understood his condition in February, 1911. He gave notice on the 18th July, 1911. This was held to be too late. Fletcher Moulton, L.J. (p. 254), said: "If he had given notice then" (in

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February), "I think he would have had a strong case for saying that up to that time he had not any idea that he was suffering from anything more than a bump which would soon pass away; but I cannot think it was reasonable for him to withhold notice from his master then, and therefore I am quite satisfied in my own mind that there was evidence which justified the learned Judge in coming to the conclusion he did. Beyond that I do not go. I think the appeal ought to be dismissed." Buckley, L.J., immediately following, said: "I am of the same opinion and for the same reasons."

In *Potter v. John Welch & Sons Limited*, [1914] 3 K.B. 1020, the representatives of the workman failed upon the ground that the injury was not latent. The principle I have been discussing is recognised. I find it difficult to think that the injury to the man was not latent.

It may some time become important, but not now, to study carefully the wording of sec. 460, which gives the right of action, and the sub-sections I have been referring to, in conjunction. By the main section the corporation is compelled to keep the highway in repair, and in case of default is "liable for *all* damages sustained by any person by reason of such default." The notice under sub-sec. (4) is not notice of an accident but "of the claim and of the injury complained of." It may be, but I express no opinion as to this at present, that this will be found to place a plaintiff who has sustained latent injuries in a somewhat more favourable position than he would be under Acts worded as the Imperial Act is.

There remains the question of prejudice to the corporation, which did not appear to be pressed, but was referred to by counsel for the appellant. The learned Judge has found that "the corporation was not in any way prejudiced in its defence of this action" by the delay in giving notice. The provision of the Act is for the protection of the municipality; and, no matter what the reasonable excuse is, or how clear the proof of it, the affirmative of this negative must co-exist, or the plaintiff fails. Like any other fact, it is to be established by direct evidence (a thing conceivably possible) or by reasonable inference from the whole circumstances and evidence in the case.

This is a class of action in which a plaintiff was formerly en-

titled to trial by jury, and the law was changed because, presumably, such cases can better be tried by a Judge alone. I have read the evidence, and I am entirely satisfied with the finding of the learned Judge upon this point. I do not see how he could come to any other conclusion. He was favourably impressed throughout with the good faith and honesty of the plaintiff's claim. It was not and could not be suggested that the plaintiff concocted the story of the accident; and the existence of the hole in the concrete was notorious and of long continuance.

The trial Judge finds that "the fall was undoubtedly caused by the defective condition of the sidewalk, and I think that the lack of repair of the sidewalk was the result of actionable negligence on the part of the municipality."

But, resuming, how could the corporation be prejudiced in its defence? By shewing that the hole was not there? The evidence they called went to prove its existence, and emphasised its dangerous character, and the failure of the corporation to execute any adequate repair until the day after notice of the accident. No experienced Judge would be likely to believe that it was warm enough in March, but too cold in February, to put in a bucket of cement, or that a sidewalk four inches thick, of properly blended material, would break away under pressure of a man's foot. It would not be disturbed by drays of coal passing over it, and there are no giants in these days. The more evidence of this class is produced the worse is the defence. I think the evidence of Brian, foot of p. 75 and top of 76, shews that the notice from Harvey, and consequent so-called repair, immediately followed the accident, and was not a week or two later, as the corporation endeavoured to shew. One would think they would have a record if they cared to produce it.

Was it that, if they had known, they would have procured a doctor, and recovery would have been more speedy? This is not defence, but reduction of damages, and was taken into account, as is shewn by the judgment.

Or was it, as sometimes happens, that there is conflict as to just how the accident happened, or doubt as to whether it happened at all? The cross-examination of the plaintiff shewed that there was no witness of the occurrence, and was directed to shew that the street was well lighted—a condition that did not change.

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Even with the assistance of counsel for the defence, and it was very marked, the echo of Mr. Brian, when questioned as to prejudice, goes to shew that they did not want more evidence. (See pp. 75 and 76, already referred to). I presume that the plaintiff was examined for discovery, and that it was easy in this way to obtain the basis of any investigation desired.

I do not know what weight, if any, the learned Judge gave to the evidence of Brian. I would not give any. However, honours were easy between counsel in the matter of leading questions. The corporation was absolutely without defence upon the merits—relied solely upon the absence of notice as a defence *per se*, and upon nothing else. If notice had been given, the corporation would have been without even an ostensible defence.

The appeal should be allowed, and judgment entered for the plaintiff for \$600, with costs here and below.

MASTEN, J.:—I have had the opportunity of perusing the judgments of the Chief Justice and of my brother Riddell.

I agree in the propositions of law as deduced by my brother Riddell from the numerous cases digested by him; but, upon consideration of the facts disclosed in evidence, I think that this case falls within the first rule deduced by him from the cases.

I think the plaintiff, on her own evidence, was aware that she had suffered a serious injury. Whether she knew its exact character is immaterial. The injury was so serious and so manifest that, in my opinion, there was in law no reasonable excuse for not giving the notice called for by the statute. On the point urged before the trial Judge, that she was so grievously affected by the accident that she could not give notice of claim to the defendants, I agree with his finding that she was quite competent mentally and physically to give the notice.

On the other branch, namely, as to whether the defendant corporation was in any way prejudiced in its defence, I agree with the finding of the trial Judge that the defendant corporation was not prejudiced by the want of notice. His finding is, in my view, adequately supported by the evidence of the witnesses Hillman and Brian.

But, as pointed out by my Lord the Chief Justice of this Court, sec. 460, sub-sec.(5), of the Municipal Act, requires not

only that the defendant corporation be not prejudiced in its defence by the lateness of the notice, but also that there be reasonable excuse on the part of the plaintiff for the want of the notice; and I find no such excuse.

It is not the duty of the Court to approbate or reprobate the enactments of the Legislature, and the lack of reasonable excuse as above defeats the plaintiff's action, notwithstanding the fact that the defence of the defendant corporation was not prejudiced by the failure to serve notice within seven days.

I would affirm the judgment of the Court below.

The Court being divided, appeal dismissed.

[APPELLATE DIVISION.]

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Negligence—Street Railway—Death of Man Struck by Moving Car—Excessive Speed not Shewn—Sounding of Gong—Evidence—Onus—Proximate Cause—No Reasonable Case for Jury—Contributory Negligence—Ultimate Negligence—Provisional Assessment of Damages at Trial.

The plaintiff's husband, attempting to cross a street upon which the tracks of the defendants were laid, came into collision with an electrically-operated car of the defendants, and was so injured that he died. At the trial of this action, brought by his widow to recover damages for his death, it was not alleged or proved that the speed of the car was excessive; and, though some witnesses testified that they did not hear the gong sounded, they were not asked whether they would have heard it if it had been rung. The driver testified positively that he did sound the gong, and that he took all possible care; and he swore to reckless or stupid want of care on the part of the man who was killed, want of care which directly caused the death. The driver also said that he could have stopped the car in a distance of about 80 feet. No other eye-witness of the accident was called; but a passenger in the car testified that another passenger, who apparently saw what was happening, stood up in the car and shouted, "Why don't you look where you are going?" Other witnesses proved that the car ran a very considerable distance after the man was struck—not less than 100 feet and not more than 200 feet—and that the man was found, when the car stopped, with parts of his person, including his head, under the fender:—

Held (LENNOX, J., dissenting), that no evidence was adduced upon which reasonable men could find that the proximate cause of the injury done was the defendants' negligence; and that the plaintiff was properly nonsuited at the trial.

Judgment of FALCONBRIDGE, C.J.K.B., affirmed.

Per MEREDITH, C.J.C.P.:—The course taken at the trial, of directing the jury to assess the plaintiff's damages, notwithstanding the nonsuit, upon the understanding that if the nonsuit should be set aside judgment should be entered for the plaintiff for the amount assessed, was unfair to the

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defendants; they should not have been deprived of the right to go to the jury.

Per MASTEN, J.:—After the collision, a new negligence arose on the part of the defendants; and, in respect of that, the deceased, carried helplessly on the fender, was not guilty of any contributory negligence. If a jury found such ultimate negligence on the part of the defendants, and that it occasioned the death of the deceased, the original contributory negligence on the part of the deceased—his walking into the car—would not prevent a recovery by the plaintiff: *Loach v. British Columbia Electric R.W. Co.*, [1916] A.C. 719, approving the judgment of Anglin, J., in *Brenner v. Toronto R.W. Co.* (1907), 13 O.L.R. 423. It did not, however, appear when or where the deceased received the injury from which he died: it might have been when he was struck, or it might have been in the period during which the car ran 80 feet, or it might have been later after the car should have been stopped—and only in the last event would the defendants be liable. The onus was on the plaintiff to shew that the injury was the result of the defendants' negligence, and of this there was no evidence.

Per LENNOX, J.:—There was evidence of negligence which should have been submitted to the jury.

APPEAL by the plaintiff from the judgment of FALCONBRIDGE, C.J.K.B., at the trial with a jury at Toronto, dismissing an action brought under the Fatal Accidents Act to recover damages for the death of the plaintiff's husband, caused by his being struck by a car of the defendants, the plaintiff alleging negligence on the part of the defendants' servants operating the car.

The trial Judge was of opinion that there was no reasonable evidence of negligence to go to the jury, and so dismissed the action; but he asked the jury to assess the plaintiff's damages, and they made an assessment of \$1,200.

February 4. The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and MASTEN, JJ.

J. M. Godfrey, for the appellant, argued that there was a case to go to the jury, and that the learned trial Judge was wrong in dismissing the action without giving the jury a chance to pass upon the facts. There was evidence, for example, upon which reasonable men could have found that the gong had not been sounded. The unknown passenger's words of warning, referred to in the evidence, might have been found to have been directed to the driver instead of to the plaintiff. The jury might have believed the whole of the evidence of the driver, a part of it, or none of it at all. A *prima facie* case had been made out, and this entitled the plaintiff to have it considered by the jury. Where, there is no specific evidence of negligence, the jury may find such negligence as a fair and reasonable inference from the facts proved:

Griffith v. Grand Trunk R.W. Co. (1911), 21 O.W.R. 305; *Winnipeg Electric R.W. Co. v. Schwartz* (1913), 49 S.C.R. 80; *Ramsay v. Toronto R.W. Co.* (1913), 30 O.L.R. 127.

D. L. McCarthy, K.C., for the defendants, respondents, contended that there had been no evidence adduced at the trial upon which reasonable men, acting conscientiously, could find that the proximate cause of the death of the plaintiff's husband had been the actionable negligence of the defendants—and that was the whole question in the appeal. It was the duty of the Judge to determine this question, which he did rightly: *Cotton v. Wood* (1860), 8 C.B. N.S. 568.

Godfrey, in reply.

February 18. MEREDITH, C.J.C.P.:—The single question involved in this appeal is, whether there was any evidence adduced at the trial upon which reasonable men, acting conscientiously, could find that the real cause of the death of the plaintiff's husband was the actionable negligence of the defendants.

The learned Chief Justice, who presided at the trial, ruled that there was not, and accordingly dismissed the action; but ruled also that the jury should assess the damages, upon the understanding or arrangement that, should his ruling be reversed upon appeal, the direction for the dismissal of the action should be set aside, and that, instead, judgment should be entered for the plaintiff with damages in the amount assessed by the jury.

I agree with the learned Judge in his ruling that there was no case to go to the jury; but feel bound to add that the provision for entering judgment for the plaintiff if that ruling had been wrong, whether that provision was made on a voluntary consent or not, was unfair to the defendants. Why should they be deprived of their right to go to the jury; and what difference could it make if, as the case was going to them anyway—on the question of damages—they should pass on the question of liability also? The defendants had an undoubted right to the Judge's ruling; and the price of that ruling should never be the loss of the right to a trial on the facts if the Judge's ruling turned out to be wrong.

No substantial loss of time, and no injustice or even inconvenience, need have arisen from giving the defendants then their right to go to a jury some time before being condemned in heavy

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damages. If it were thought that anything said by the Judge on the motion to dismiss the action might have some effect on the jury, it would be a simple matter to let the jury retire during the discussion, or for the Judge to take care in the discussion of it not to say anything that could by any chance be prejudicial to either party. But in this case the parties are bound by the arrangement made at the trial, and I mention the subject in the interest of the administration of justice generally, only; it seeming to me to be plain that a defendant in such a case should be precluded only from, in any case, demanding a new trial because only of the nonsuit being set aside.

At the trial, the driver of the car which is said to have caused the man's death was called and examined as a witness for the plaintiff. No evidence was given in the defendants' behalf. The driver testified that all the care that was possible, under the circumstances, on his part, was taken; and to reckless or stupid want of care on the part of the man who was killed, want of care which directly caused his death.

No other eye-witness of the accident was called, though there were passengers in the car some of whom must have seen it, and I cannot but think could have been found if diligently sought. Other witnesses were called who proved that the car ran a very considerable distance after the man was struck.

Several witnesses were called who testified that they did not hear any sound of the gong of the car; but not one of them was asked or ventured any opinion on the question whether they would have heard it if it had rung; on the contrary, some of them volunteered a statement of their inattention. The driver testified positively and particularly that he did sound the gong; and lastly one witness, in answer to questions of counsel for the plaintiff, testified that she was one of the passengers on this car, and that another passenger "jumped up and hollered, 'Why don't you look where you are going?'" and that "he stood up and he screeched profane language, and he hollered, 'Why don't you look where you are going?'" immediately before the accident.

It is contended for the plaintiff that there was evidence upon which reasonable men could find that the gong was not sounded; but that is not so, it would not be so if the testimony of the plaintiff's witness, the driver of the car, that it did sound and that that

he knows because he sounded it himself, had been given for the defendants instead of the plaintiff. If the plaintiff wished to make some reasonable evidence out of the testimony of the inattentive witnesses who did not hear, he might have asked if they would have heard the gong had it been sounded; but that question was not asked; and when counsel, of very considerable experience in this class of cases, abstains from asking such a question in such circumstances, especially when he is also the plaintiff's solicitor in the action, there can be no doubt the asking would not have helped but would have harmed the plaintiff's case.

Then it is said that the jury might believe the testimony of the driver that he could have stopped the car in a distance of about 80 feet, and disbelieve all else to which he testified; and then, having regard to the distance the car ran after the man was struck, might find that he was really not looking out at all, but, going at high speed, blindly ran the man down. But it is equally true that any one could make several other patch-work theories with quite as much—if one can apply the word “much” to them—foundation in fact; losing sight of this fact, among others, that there was no evidence except that of the driver concerning the manner in which the man came to the place of collision, and that evidence is that he came in a grossly negligent manner, a manner which was the true cause of his death. It would not be enough to prove a negligent driving of the car. It must be proved, not taken for granted, that that was the cause of the accident. There was at the trial, and now is, no contention that there can be any recovery on the ground of negligence in the speed of the car. Counsel for the plaintiff put his position in that respect, in answer to a question of the Judge, “Have you any evidence of excessive or dangerous speed?” thus: “No; I do not think 8 or 10 miles an hour was excessive and dangerous.” And the distance that the car ran after the accident is not necessarily inconsistent with the driver's testimony; he does not say that the brake was retained at emergency position after the collision, nor is it unlikely that it would be released.

Then the story of the excited passenger's warning is against the plaintiff, indeed strongly corroborates the driver's testimony; and it is hardly reasonable to suggest now that the words might have been meant for the driver, especially after the entire absence

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of any effort on the plaintiff's behalf to connect them, through the witness, with him.

It is quite true, and well it is that it is true, that the old-time theory that the party putting a witness in the witness-box to testify in his behalf accredited him, is well worn out; yet it is not to be forgotten that the driver was the plaintiff's witness, and that, admittedly, the plaintiff cannot recover unless some credit is given to his testimony.

If, in all the circumstances of this case, it can be said that reasonable men, acting in good faith, could base a verdict of \$1,200, and incidentally find the driver guilty of manslaughter, upon the evidence adduced in this case, I prefer to be classed among the unreasonable. How could, not only any reasonable but indeed any sane man, from the fact that a man was killed by a car that might have been stopped in 80 feet but was not until it had gone twice that distance, upon his oath of office find that the death was not a mere accident, or was not caused by the man's own negligence, but was caused by the negligence of the driver, when excessive speed and failure to sound the gong are not proved; and upon that finding compel the defendants to pay \$1,500 or more? And I desire to add again my condemnation of a course too commonly adopted, of giving as little evidence as possible for fear of eliciting something unfavourable, having no faith in the facts, having faith and hope only in winning the sympathy of the jury—instead of, with reasonable fairness to Judge and jury, endeavouring with some degree of sincerity to reveal, not conceal, the truth.

No case of "ultimate negligence" was ever suggested; the running on after the collision was relied upon only as evidence of not looking out and so not seeing the man. There was no evidence that running on, instead of stopping immediately, was improper; it may have been safer for the man on the "fender" than a powerful application of the brakes, which might have dislodged him only to be run over.

Recent cases in the higher Courts of England and in the Supreme Court of Canada are much relied on in this case, as in all other cases in which it is sought to get to a jury without any reasonable evidence upon which they could find in the way desired; and we are impressively told that a jury have a right to draw

inferences, and that this case or that case is stronger than, or as strong as, or nearly as strong as, some case decided in one of those Courts; forgetful of these two things, that it is as old as the law that a case may be established on circumstantial evidence; and that no case decided on its facts is an authority for a finding of fact one way or other in any other case to be decided on its facts, however helpful the reasoning in it may be; that no two cases can be quite alike in all their facts and circumstances; and that the one question in all such cases as this must be: could reasonable men, upon the evidence adduced in it, find that the proximate cause of the injury done was the defendants' negligence?

There is a well-defined and unmistakable boundary between the province of the Court and that of the jury in all such cases as this; and the interests of justice require to-day, just as much as they did in the days of Erle, C.J.—see *Cotton v. Wood*, 8 C.B.N.S. 568—that the right and duty of the Courts to determine whether there is evidence upon which reasonable men could find, before letting any case go to a jury, should be always exercised, that no surrender or invasion of either province should be permitted, however difficult it may occasionally be to tell on which side of the line some exceptional case may be. Reasonableness—whether it is called a question of law or of fact—such as this “belongeth to the knowledge of the law, and is therefore to be decided by the Justices.”

I would dismiss the appeal.

RIDDELL, J.:—I agree.

MASTEN, J.:—The facts in this case have been set forth in the reasons for judgment of the Chief Justice (*supra*) and of Mr. Justice Lennox (*infra*), and I do not pause to restate them.

Down to the moment when the car struck the deceased I find no evidence proper to be submitted to a jury. In the course of developing her case, the plaintiff is obliged to call witnesses whose testimony at the least makes it entirely uncertain whether the accident in question was due to the fault of the street railway company or to the fault of the deceased, and in fact makes it look rather as if the deceased walked into the street car.

That appears to bring the case, as regards the original collision,

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within the decision of *Wakelin v. London and South Western R.W. Co.* (1886), 12 App. Cas. 41. I refer especially to the remarks of Lord Watson at p. 48 and to the remarks of Bowen, L.J., as reported in [1896] 1 Q.B. at p. 193, note.

The plaintiff, having given evidence of a state of facts which is equally consistent with the collision having been caused by (in the sense that it could not have occurred without) her husband's own negligence as by the negligence of the defendants, does not prove that it was caused by the defendants' negligence. But after the collision it seems to me that a new negligence arose on the part of the street railway company, and that in respect of such new negligence the deceased, carried helplessly on the fender, was not guilty of any contributory negligence.

A man is killed; it is proved that the car, travelling at 10 or 12 miles per hour, struck him, that on being struck he fell on the fender in front of the car with his head to the east, that after the collision the car travelled not less than 100 feet and not more than 200 feet before stopping, that the car should have been stopped within 80 feet of the collision, that the deceased was found, when the car stopped, with parts of his person, including his head, under the fender. How far he had been pushed forward in that position does not appear. The car could have been stopped much sooner, and the failure to do so was evidence of negligence. Under these conditions, I think it would (but for the circumstance hereafter to be mentioned) be the duty of the trial Judge to leave it to the jury to say whether the death of the deceased was occasioned by this negligence of the defendants. I think there was evidence from which such negligence might have been inferred. I do not say that, acting as a jurymen, I would have inferred it, but another might reasonably have done so.

It seems to me plain that if a jury found such ultimate negligence on the part of the street railway company, and that it occasioned the death of the deceased, the original contributory negligence on the part of the deceased, by walking into the street car, would not prevent a recovery by the plaintiff.

I refer to the recent decision of the Privy Council in the case of *Loach v. British Columbia Electric R.W. Co.*, rendered on the 26th July, 1915.* In that case, one Sands drove a cart on to a

*This case is now reported in [1916] A.C. 719.

level crossing, and neither saw nor heard the approaching car till he was close to the rails and the car was nearly on him. At that time, with a loaded waggon and horses going two or three miles an hour, nothing could possibly have been done to avert the accident. Sands was guilty of negligence in not looking out to see that the road was clear. Sands was killed, and his administrator sued the railway company. In delivering the judgment of the Court, Lord Sumner says:—

“The car knocked cart, horses, and men over, and ran some distance beyond the crossing before it could be stopped. It approached the crossing at from 35 to 45 miles an hour. The driver saw the horses as they came into view from behind a shed at the crossing of the road and the railway, when they would be 10 or 12 feet from the nearest rail, and he at once applied his brake. He was then 400 feet from the crossing. If the brake had been in good order it should have stopped the car in 300 feet. Apart from the fact that the car did not stop in time, but overran the crossing, there was evidence for the jury that the brake was defective and inefficient and that the car had come out in the morning with the brake in that condition. . . .

“Clearly if the deceased had not got on to the line he would have suffered no harm, in spite of the excessive speed and the defective brake, and if he had kept his eyes about him he would have perceived the approach of the car, and would have kept out of mischief. If the matter stopped there, his administrator’s action must have failed, for he would certainly have been guilty of contributory negligence. He would have owed his death to his own fault, and whether his negligence was the sole cause or the cause jointly with the railway company’s negligence would not have mattered. . . .

“If the jury accepted the facts above stated, as certainly they well might do, there was no further negligence on the part of Sands after he looked up and saw the car, and then there was nothing that he could do. There he was, in a position of extreme peril and by his own fault, but after that he was guilty of no fresh fault. The driver of the car, however, had seen the horses some perceptible time earlier, had duly applied his brakes, and if they had been effective, he could, as the jury found, have pulled

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up in time. Indeed, he would have had 100 feet to spare. If the car was 150 feet off when Sands looked up and said 'Oh,' then each had the other in view for 50 feet before the car reached the point at which it should have stopped. It was the motorman's duty, on seeing the peril of Sands, to make a reasonable use of his brakes in order to avoid injuring him, although it was by his own negligence that Sands was in danger. Apparently he did his best as things then were, but partly the bad brake and partly the excessive speed, for both of which the appellants were responsible, prevented him from stopping, as he could otherwise have done. On these facts, which the jury were entitled to accept and appear to have accepted, only one conclusion is possible. What actually killed Sands was the negligence of the railway company, and not his own, though it was a close thing. . . .

"The consequences of the deceased's contributory negligence continued, it is true, but, after he had looked, there was no more negligence, for there was nothing to be done, and, as it is put in the classic judgment in *Tuff v. Warman* (1858), 5 C.B.N.S. 573, at p. 585, his contributory negligence will not disentitle him to recover 'if the defendant might by the exercise of care on his part have avoided the consequences of the neglect or carelessness of the plaintiff.'"

And Lord Sumner then quotes with approval the following passages from the judgment of Anglin, J., in *Brenner v. Toronto R.W. Co.* (1907), 13 O.L.R. 423:—

"Again, the duty of the defendants to the plaintiff, breach of which would constitute 'ultimate' negligence, only arose when her danger was or should have been apparent. Prior to that moment there was an abstract obligation incumbent upon them to have their car equipped with efficient emergency appliances ready and in condition to meet the requirements of such an occasion. Had an occasion for the use of emergency appliances not arisen, failure to fulfil that obligation would have given rise to no cause of action. Upon the emergency arising, that abstract obligation became a concrete duty owing to the plaintiff to avoid the consequences of her negligence by the exercise of ordinary care, breach of which would constitute actionable negligence. Up to that moment there was no such breach of duty to the plaintiff. In that sense

the failure of the defendants to avoid the mischief, though the result of an antecedent want of care, was negligence which occurred, in the sense of becoming operative, immediately after the duty, in the breach of which it consisted, arose. It effectively intervened between the negligence of the plaintiff and the happening of the casualty" (pp. 437, 438). •

"But there is a class of cases where a situation of imminent peril has been created, either by the joint negligence of both plaintiff and defendant, or, it may be, by that of the plaintiff alone, in which, after the danger is or should be apparent, there is a period of time, of some perceptible duration, during which both or either may endeavour to avert the impending catastrophe.

. . . If, notwithstanding the difficulties of the situation, efforts to avoid injury duly made would have been successful, but for some self-created incapacity which rendered such efforts inefficacious, the negligence that produced such a state of disability is not merely part of the inducing causes—a remote cause or a cause merely *sine quâ non*—it is, in very truth, the efficient, the proximate, the decisive cause of the incapacity, and therefore of the mischief. . . . Negligence of a defendant incapacitating him from taking due care to avoid the consequences of the plaintiff's negligence, may, in some cases; though anterior in point of time to the plaintiff's negligence, constitute 'ultimate' negligence, rendering the defendant liable notwithstanding a finding of contributory negligence of the plaintiff . . ." (pp. 439, 440).

It seems to me that these observations apply in the present case to the occurrences which took place between the time when the deceased fell helpless across the fender, and the time when the car was finally stopped at Queen street.

The difficulty, however, in the plaintiff's way, is that it does not appear when or where the plaintiff's husband received the injury from which he died. That injury might have occurred: (1) when he was struck by the car; (2) during the progress of the car before it could be stopped, that is, within 80 feet of the collision; (3) while the car was still proceeding after it should have been stopped, that is, at a point more than 80 feet past the point of collision.

Only in the last event would the defendants be liable.

No evidence was given or could be given as to the place on the

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street where the fatal injury happened. The onus was on the plaintiff to shew that the injury was the result of the defendants' negligence, and of this I think there was no evidence.

The nonsuit was therefore proper.

LENNOX, J.:—At the close of the plaintiff's evidence and after motion for a nonsuit, the jury assessed the plaintiff's damages at \$1,200, counsel for the company agreeing that judgment should be entered for the plaintiff for the amount found, in the event of the appellate Court holding that there was evidence proper to be submitted to the jury upon the question of liability.

The action is brought by the widow of Nicolla Sitkoff, a man then of about sixty years of age, alleging that her husband was killed on the 18th March, 1915, by the negligent operation of one of the company's cars, then being driven south upon Parliament street, in the city of Toronto. A plan put in shews Parliament street from Queen street north to Sydenham street. All south-bound cars must stop at Queen street before taking the curve to go west. There is a liquor store on the east side of Parliament street. It is 283 feet north of Queen street and 161 feet south of Sydenham street. The distance from Queen to Sydenham street is 444 feet. The deceased lived at the corner of Duchess and Parliament streets.

His wife gave evidence that he left his house to get a bottle of beer at this liquor store, a little before nine o'clock on the evening in question. He had always been round-shouldered, and walked with his head forward and drawn a little down. She says he was an active, alert man. His hearing was good, and he was in good health when he left the house. He did not return. She found him in St. Michael's Hospital some hours afterwards, and he died before morning.

William Gallagher was talking to an acquaintance at the north-east corner of Queen and Parliament streets at about nine o'clock that evening. He was facing east and heard an unusual sound up Parliament street. He judged it to be caused by the dropping of a car fender. He looked north up Parliament street, saw a car coming on steadily down, heard a constant dragging sound from the time he heard the first noise, and the

car kept on without stopping until it stopped, as all cars must stop, at Queen street. Among other things he is asked:—

“Q. What did you do when you heard the fender fall? A. I looked up the street, I thought the fender hit a dog or something.

“Q. How far away was the car, how far up? A. I should judge about 100 feet.

“Q. What else did you see or hear as the car came down? A. As the car came down I see a bundle in it, I could not see what it was, I thought something it had picked up, I could not see it was man; it just attracted my attention; I seen something there, I could not say what it was until the car pulled up, and I helped to pull the man out from under the fender. . . .

“Q. You went over? A. Yes.

“Q. What did you find? A. A man under the fender. I held the fender up and helped to pull him out.

“His Lordship: You say he was under the fender. A. Apparently, yes.

“Mr. Godfrey: What part of his body was under the fender? A. His head. The man was unconscious.”

This witness was pretty firmly of opinion, but not positive, that the man's head was to the east. He did not hear a gong, but said it was too far away, and, besides, he was not paying attention. As to the gong, it could not be said that this witness gave any evidence.

Robert Hopkins was on the south-east corner of Parliament and Queen streets when this car was coming down from Sydenham street upon the same trip. His attention was attracted by what he calls “an extraordinary noise” as of something struck. He could see the car 150 feet away. Watched it all the way down to the Queen street Y, the usual stopping-place. Did not stop from the time he first saw it until then. The car came right on in the usual way, except that the fender was bumping all the time and making a lot of noise. He saw the man picked up and laid upon the sidewalk. Beyond this he does not speak of the man's condition. This witness is no better than Gallagher on the gong question. Both these witnesses are out upon their estimate of the distance. Where the collision occurred is clearly fixed by the next witness, Wares, and Miss Beaver; about opposite or perhaps

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a little south of the liquor store. Hopkins in a sense comes pretty close to it, as he estimates the 444 feet from Queen to Sydenham streets at 300 feet. Proportionately his 150 feet would mean 222 feet.

George Wares, the company's motorman, was called. He was asked:—

"Q. You are the motorman on the car *that killed this man*, Sitkoff? A. I was, sir.

"Q. And this accident happened on the night of the 18th March, 1915? A. Correct.

"Q. You got the facts, I suppose, and put in a report on the case? A. Yes. . . .

"Q. Taking a car going 8 or 10 miles an hour, stopping in an emergency, what would you do? A. Apply my emergency brake.

"Q. What else? A. Put down some sand.

"Q. What do you mean by applying the emergency brake? A. Apply the quickest brake that can stop the car in.

"Q. What is that? A. That is the reverse.

"Q. Reverse the car, in what distance would the car stop? A. About 80 feet."

Then he tells that he was going 12 or 13 miles an hour after leaving Sydenham street.

"Q. And at the time of the accident? A. From 8 to 10 miles an hour at the time of the accident.

"Q. Did you see this man? A. I seen him, yes.

"Q. When did you first see him? A. Stepping off the kerb.

"Q. Did you not see him before that? A. No, sir."

He is very positive about this. It is immaterial, except as a test.

Counsel reads from examination for discovery: "Q. 260. How far did you observe him walking on the sidewalk? A. Just a few feet." And a lot of other questions and answers to the same effect, to which the witness finally says: "If I thought that I would be a little excited at the time."

"Q. How was he looking? A. He was looking downwards, head down.

"Q. Did he see your car? A. I could not say, sir. He took no notice of it anyway.

"Q. When did you realise he was in danger? A. As soon as I see he took no attention to my gong.

"Q. You say you sounded the gong? A. Yes.

"Q. When did you sound the gong? A. As soon as I seen there was danger.

"Q. When? A. Just after he stepped off the sidewalk."

Then this witness says that at the time of impact "he" (Sitkoff) "was on the outside rail, and the right front corner of the car hit the left side of his head, and he fell upon the fender, his head going to the east; and that his head was still pointing easterly when the car reached Queen street."

He swears that he sounded the gong, reversed the brakes, and did everything, as already described, for a sudden stoppage of the car, at one and the same time, that is, as the man left the kerb, and this was when the man was opposite or a little north or a little south of the liquor store. If he did what he says he did, he did everything that a motorman could do—at that stage, at all events—and a jury believing him could not find the company negligent. The car did not stop in 80 feet or stop at all. If the case went to the jury it would be open to them to accept his whole story, or part of it, or none of it. If they believed the whole of it, or none of it, the plaintiff would probably fail, *if death was caused by the impact alone*.

With the greatest respect for the opinion of the learned and experienced Chief Justice who heard this case, I am of opinion that, even if there had been no other evidence in the case, the evidence of these four witnesses alone, covering as it does the whole ground of inquiry—it may not be fully or truthfully, that matters not—was sufficient to make out a *prima facie* case, conclusive or inconclusive, it matters not; and entitled the plaintiff to have a jury consider and determine whether or not as a matter of fact Nicolla Sitkoff's death was caused by actionable negligence of the defendant company; and, if it can with any degree of justice be said that the testimony of these four witnesses afforded some evidence of negligence, *à fortiori* was there evidence of negligence, causing the injury, to go to the jury, when the evidence of three other witnesses had shewn that it was at least improbable that the gong was sounded and practically impossible to believe that the brakes were applied or the car checked. By this I mean, of course, negligence causing the fatality.

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Ella Beaver was a regular patron of the street railway service. Mr. McCarthy elicited this, and that immediately preceding the accident "the car was just travelling at the ordinary pace . . . nothing either of speed or slowness to attract attention." She says the car had a long seat on each side, a closed car. She was sitting on the west, one seat space from the front of the car, and this space was occupied by an unknown man. The motorman was in view of both of them. The unknown man was facing where the motorman stood in the centre of the car. He would be looking south-east. Sitkoff is said by the motorman to have come from the west side of the street and at right angles to the sidewalk. The unknown man suddenly jumped up, and, waving his hand and accompanying it with very bad language, yelled, "Why don't you look where you are going?" They were then about opposite the liquor store. This was the first thing that attracted her attention, and it was the last thing, except that the action of this man caused a hush in the car, every one "quit talking to see what was making this man holler." They did not seem to find out. She did not find out, if at all, until she got off at Queen street. She knew nothing of the accident until then. She was not aware of the application of the emergency brake. Cross-examined by Mr. McCarthy she says:—

"Q. The first thing you heard was this man stand up and make the remark which you have told us? A. Yes.

"Q. What happened then, did that make you look, *did you notice anything different in the action of the car at all?* A. Every person on the street car got excited from the action of this man." (She explains later that by this she means stopped talking to see what it meant.)

"Q. Did you notice any jerking or jolting of the car; did you hear any noise besides the gentleman call out? A. No.

"Q. Nothing at all? A. No."

Earlier she is asked:—

"Q. When did you first know that an accident happened? A. When the car stopped.

"Q. Where did the car stop? A. At the side door of the Rupert Hotel on Parliament street."

The Rupert is on the corner of Queen and Parliament. A fire was in progress when the case was being tried, and by consent

the evidence of Edward Mooney and Thomas Kennedy, given at the coroner's inquest, was put in. The company were represented at the inquest by Mr. Forest. These men, as members of the fire department, one of them an engineer, were just the class of men to notice everything that happened. They were standing together upon the rear platform.

Edward Mooney swears that he heard the fender drop and drag along the street for 150 or 200 feet. It was dragging all the time from the time he heard it drop until the car stopped at Queen street. He did not know anything unusual except the dropping of the fender until, seeing the crowd gather, he jumped off. He noticed that the car went right on, and wondered that they did not stop to lift the fender. The motorman did nothing about it at all.

"Q. The car did not come to a sudden stop then? A. It stopped at its usual stopping-place; he did not stop in between.

"Q. You could hear the fender distinctly, could you? A. Yes, from the back platform, and it drew those people's attention to it, and we wondered why he didn't stop when the fender was dragging."

The conductor shewed no excitement. When the car stopped, he took names, etc.

The deceased was right under the fender. The car had to be backed and the fender raised to get him out. He was unconscious, and this witness helped to take him to St. Michael's Hospital. "I thought myself it was only a fender dropped."

Kennedy's evidence is to the same effect.

Before the decision of the Privy Council in *McArthur v. Dominion Cartridge Co.*, [1905] A.C. 72, there were cases in our Supreme Court to the effect that specific negligence causing the injuries complained of must be shewn. This is not now the law. In *Grand Trunk R.W. Co. v. Hainer* (1905), 36 S.C.R. 180, it was held that the deceased had a right to cross the track, and, as there was no evidence of want of care upon his part shewn, negligence upon his part could not be presumed. In this case it was also held that, although there was not any precise proof that the negligence of the company was the direct cause of the accident, the jury could reasonably infer it from the facts proved.

In *Winnipeg Electric R.W. Co. v. Schwartz*, 49 S.C.R. 80,

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referring to the *Dominion Cartridge Co.* case, Davies, J., says (p. 84): "Since that decision, however, this Court has followed the rule or principle there laid down, namely, that where the circumstances are such that positive and direct evidence on specific negligence cannot be given it is open to a jury, if the facts as proved are sufficient, to find such negligence as a fair reasonable inference from those facts." This case establishes that when a street railway company's servants are acting negligently or in ignorance of what is happening at or about the time of the occurrence complained of, it is a circumstance from which the jury may infer that the casualty was occasioned by their want of care.

In *Ramsay v. Toronto R.W. Co.*, 30 O.L.R. 127 (C.A.), it was held that, if the facts are capable of two equally possible views, it is the duty of the Judge to let the jury decide between these conflicting views.

The circumstances in which the deceased was found, and the manner in which the car was then being operated, are in themselves evidence of negligence: *Fleming v. Toronto R.W. Co.* (1912), 27 O.L.R. 332; *S.C., sub nom. Toronto R.W. Co. v. Fleming* (1913), 47 S.C.R. 612; *Winnipeg Electric R.W. Co. v. Schwartz*, above; *Scott v. London Dock Co.* (1865), 3 H. & C. 596.

How did the matter stand at the conclusion of the plaintiff's case? It was in evidence that at about nine o'clock the plaintiff's husband left his home, sober, capable, and in good health, upon an errand involving the crossing and re-crossing of Parliament street, and expecting to be home within a few minutes. Within that few minutes he is struck by the defendant company's car at a distance of more than 200 feet north of Queen street, is dragged down for this distance by the fender of the car, and found under the fender when the car stops at its usual stopping-place, unconscious and practically dead. Four witnesses testify to the collision and the dropping of the fender, which is the same thing; and the uninterrupted grind as the car goes on from the point of impact to Queen street, the ordinary and unavoidable stopping-place; an operation from which in itself a jury would be quite justified in inferring the company's negligence as the cause of death.

It was in evidence that the car was going at a moderate rate of speed, and could be stopped in 80 feet (and, parentheti-

cally, it would be surprising if there were not men upon that jury who from their knowledge of the operation of the cars in this city would find it difficult to believe that it would require emergency brakes to stop in 80 feet, or that with emergency brakes it would take anything like 80 feet to stop a car running at 8 or 10 miles an hour).

It was in evidence, on the testimony of the company's motorman, that he saw the deceased and struck and killed him, that he apprehended the danger, and reversed the motive power, and did everything necessary to stop in 80 feet, but the car did not stop nor abate its usual speed; and, although every other witness was cross-examined, there was no explanation offered of how it happened that, if this drastic measure was resorted to, neither the men standing on the rear platform nor Ella Beaver nor the conductor, nor anybody so far as appears, was in the slightest degree incommoded or felt the slightest jolt or jar, or knew or knows that it was done; there is no explanation of whom the unknown man was addressing, in a closed car, or whether what he said was addressed to the motorman, or what it meant: no explanation of the motorman's extraordinary and seemingly callous action in continuing his trip on down Parliament street exactly as if nothing had happened, and no explanation of how it was that a man, with protruding head and with his feet upon the rail, was struck on the head by the corner of a car 18 or 20 inches or more west of the rail, or how it happened that a man struck by a force from the north would fall east, or how it came about that a fender, which this witness swears can only be tripped by a frontal obstruction, was tripped in this instance by a weight falling upon it from above: *or which is true*—that the man was on the rail as asserted upon the trial, or in front of this witness and between the rails as previously sworn to by this witness?

These are all matters for the consideration of a jury, and which they are peculiarly qualified to reconcile or reject in arriving at conditions as they really were.

On the other hand, there was in evidence the testimony of the two men on the platform and Miss Beaver, upon which a jury would be perfectly justified in concluding, if they felt that the evidence as a whole demanded it, that Wares' story of the sounding of the gong, the standing on the rail, and the sudden and violent

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application of the emergency brake or any brake, unknown to anybody, was a pure fabrication, an afterthought for the protection of Mr. Wares. What they would have done is not to the point, if what they should have been allowed to deliberate upon is the issue. Was there evidence upon which reasonable men might find actionable negligence causing the accident?

With very great respect for the opinion of the learned Chief Justice who presided at the trial, and for the conclusion reached by members of this Court, much more experienced and capable of judging than I am, I yet hold the opinion that there was evidence which ought to have been submitted to the jury.

I think the appeal should be allowed and the judgment dismissing the action be set aside, and that judgment should be entered for the plaintiff for \$1,200, with costs here and below.

Appeal dismissed; LENNOX, J., dissenting.

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[APPELLATE DIVISION.]

RE TAYLOR.

Will — Construction — Devise — “Issues” — “In Fee” — Life Estate — Remainder — Rule in Shelley’s Case.

The testator gave and devised land unto his two daughters M. and J., “to have and to hold to the use of them the said M. and J. for and during the terms of their natural lives as tenants in common and after their decease the undivided share of each to the use of their respective issues in fee so that the child or children of each will take his her or their mother’s share but in case the said J. should die without issue then I give and devise her share thereof to the children of the said M. alone share and share alike;” — *Held*, that the words “in fee” are not necessarily equivalent to “in fee simple;” but the testator had interpreted his own language and shewn that by “issues,” in the phrase “respective issues in fee,” he meant “children;” and, therefore, M. took only a life estate in the land.

King v. Evans (1895), 24 S.C.R. 356, and *Van Grutten v. Foxwell*, [1897] A.C. 658, distinguished.

Judgment of RIDDELL, J., affirmed.

MOTION by the executors of George Mackenzie Stewart for an order determining a question as to the proper construction of the will of George Taylor, deceased.

December 6, 1915. The motion was heard by RIDDELL, J., in the Weekly Court at Toronto.

R. S. Cassels, K.C., for the applicants.

A. R. Clute, for the husband and children of Marietta A. Weller, deceased.

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December 7, 1915. RIDDELL, J.:—The sole question on this motion is, whether Marietta A. Weller took an estate (1) in fee, (2) in tail, or (3) for life, in the lands mentioned in the devise contained in the will made in 1883 of George Taylor, in the following words:—

“I give and devise unto my two daughters Marietta Weller and Jennie Campbell lot number 2 on the north side of Bridge street according to Davenport plan of lot number 24 on the west side of Pinnacle street in the city of Belleville in the county of Hastings: to have and to hold to the use of them the said Marietta Weller and Jennie Campbell for and during the terms of their natural lives as tenants in common and after their decease the undivided share of each to the use of their respective issues in fee so that the child or children of each will take his her or their mother's share but in case the said Jennie Campbell should die without issue then I give and devise her share thereof to the children of the said Marietta Weller alone share and share alike.”

There is nothing in the remainder of the will which, in my view, assists in the determination of the effect of this devise, and we must take the words simply as they stand.

“Issue” means *primâ facie* “heirs of the body:” *Roddy v. Fitzgerald* (1858), 6 H.L.C. 823, at p. 872, and, were it not for the case of *King v. Evans* (1895), 24 S.C.R. 356, cited by Mr. Clute, I should have had no doubt of the effect of this devise.

In that case, the devise read, “to my son James for the full term of his natural life and from and after his decease to the lawful issue of my said son James to hold in fee simple but in default of such issue him surviving then to my daughter Sarah Jane,” etc., etc. Mr. Justice Ferguson held, *Evans v. King* (1893), 23 O.R. 404, that this gave an estate in fee tail according to the rule in Shelley's case: in the Court of Appeal (*Evans v. King* (1894), 21 A.R. 519), this was reversed, and James was held entitled to a life estate only. Three written judgments were given out—Hagarty, C.J.O., was appalled (as am I) at the mass of conflicting authority, and on the whole considered that James took only a life estate by virtue of the words “in fee simple”—Burton, J.A., and Mac-

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lennan, J.A., also gave written judgments, the latter saying, p. 537: "We have a plain and unmistakable gift of an estate for life only to James, and an equally plain and unmistakable gift at his death to his lawful issue in fee simple." In the Supreme Court of Canada, the language of Strong, C.J., was most explicit (p. 365): "The question is whether he meant the issue of his son to take in fee simple, and in so many words he said that he did."

Had then the language of this will been, as in that under consideration in *King v. Evans*, "in fee simple," and not "in fee," I should be bound by that case to decide that the devisee took only a life estate.

Is there any difference because the words used are "in fee" and not "in fee simple"?

All the way through the judgments of Hagarty, C.J.O., and Burton, J.A., as well as in many of the cases cited, the language "in fee" is used as equivalent to "in fee simple"—and of course it is so in ordinary parlance. I think it would be to make too subtle a distinction—always to be avoided if possible—to hold that because the testator used the words "in fee," instead of "in fee simple," the meaning of his will is changed. If such a distinction is to be drawn, I think it should be by the Supreme Court—or at least the Appellate Division—not by a single Judge.

And, while "I quite agree that we have nothing to do with what was or was not the intention of the testator," and "what we have to do is to ascertain what is the meaning of the words which we find in this will," I am glad that I am able, within the authorities, to give the interpretation to this will which I am convinced carries out the testator's real intention.

Costs out of the property concerned in this application.

The applicants appealed from the order of RIDDELL, J.

January 27, 1916. The appeal was heard by MEREDITH, C.J. O., GARROW, MACLAREN, MAGEE, and HODGINS, JJ.A.

R. S. Cassels, K.C., for the appellants, argued that, admitting that the words "in fee" were equivalent to "in fee simple," Marietta A. Evans nevertheless took under the will an estate in tail. He referred to *King v. Evans*, 24 S.C.R. 356; *Van Grutten v. Foxwell*, [1897] A.C. 658, 662, 677, a case which practically in part overruled the *Evans* case.

A. R. Clute, for the respondents, referred to Theobald on Wills, 7th (Canadian) ed., p. 424, and cases there cited; *Lees v. Mosley* (1835), 1 Y. & C. Ex. 589, 608, 609; *Slater v. Dangerfield* (1846), 15 M. & W. 263; *Evans v. King*, 21 A.R. 519; *King v. Evans*, 24 S.C.R. 356; *Fisher v. Anderson* (1880), 4 S.C.R. 406 415.

Cassels, in reply.

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February 21, 1916. The judgment of the Court was delivered by MEREDITH, C.J.O.:—Appeal by the executors of George Mackenzie Stewart from an order dated the 7th December, 1915, made by Riddell, J., on an originating motion for the construction of the will of the testator, dated the 3rd October, 1883.

The question for decision is as to the estate which Marietta Asenath Weller took under the will in lot number 2 on the north side of Bridge street, in the city of Belleville, the appellants contending that it was an estate tail and the respondents that it was a life estate. The learned Judge, being of opinion that the case was governed by *King v. Evans*, 24 S.C.R. 356, gave effect to the contention of the respondents.

[The Chief Justice set out the devise, as above, and proceeded:]

Unless *King v. Evans* is distinguishable because the words of the devise there were, “to my son James for the full term of his natural life and from and after his decease to the lawful issue of my said son James to hold in fee simple . . . ” or if the testator has interpreted the language he has used so as to shew that by the word “issue” he meant “children,” the conclusion to which my brother Riddell came was right.

It was contended by Mr. Cassels that the decision in *King v. Evans* is inconsistent with that of the House of Lords in *Van Grutten v. Foxwell*, [1897] A.C. 658, and is overruled by it.

By the will in question in that case, lands were devised to trustees in trust to receive the rents and profits to and for the use and benefit of such of the testator’s child or children as should be living at the time of his death; and from and after such child or children should have attained the age of twenty-one years or be married, then in trust to permit and suffer such child or children, as they should severally attain the age of twenty-one, or be married, to receive and take the rents and profits, if more than one, in equal shares for her, his, and their own use and benefit for the

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term of her, his, and their life or lives; and if he left only one child then to permit and suffer such one child to receive the rents and profits for her or his sole use and benefit for the term of her or his life; and "the testator declared that his will was that from and after the death of such child or children, the trustees should stand seised of the lands devised to them in trust unto and to the use of the heirs of the body and bodies of such child or children, if more than one, to be equally divided between them, such lands to be legally conveyed and assured unto such heirs of any child or children in equal shares as they should severally and respectively attain the age of twenty-one years, or be married, and to their several and respective heirs and assigns for ever."

There was a gift over to collateral relatives, introduced in these terms: "And if it shall happen that I shall depart this life leaving no child or children, or issue of any child or children, or if such child or children as I shall leave, and the issue of such child or children, shall die before he, she, or they shall attain the age of twenty-one years or be married."

It was contended on the part of the appellants that by the words "to be equally divided between them," in conjunction with the subsequent direction to the trustees to convey to "such heirs" in fee, and with the other provisions of the will, there was enough to shew that the testator could not have used the words "heirs of the body and bodies of such child or children" in their legal sense, or intended thereby to designate the whole stock of inheritable descendants of his child or children in due course of succession (p. 664). That contention did not prevail, but it was held that the only child of the testator took the estate in fee tail, with a direction to the trustees to convey the reversion in fee to the heirs of the tenants in tail at a particular time, and that this direction was not inconsistent with the creation of estates tail in the children.

It was said by Lord Macnaghten at p. 679: "What the testator says in effect is this: 'If one or more of my descendants being tenant in tail, or tenants in tail in possession, should marry or attain twenty-one, I cancel all ulterior limitations in favour of collaterals, and give him or them the fee simple expectant on the determination of the estate tail.'"

Such a disposition differs widely from that which the testator.

made in *King v. Evans*. He had limited the remainder, after the determination of the life estate, "to the lawful issue of his son James to hold in fee simple." In the *Van Grutten* case what the testator had done was to devise the remainder after the determination of the life estate in such a way that, coupled with the devise for life by the operation of the rule in *Shelley's* case, the daughter was tenant in tail, and he had also devised the reversion in fee simple expectant on the determination of the estate tail to such one or more of his descendants being heirs in tail who should marry or attain twenty-one. These were separate and distinct estates, and the devise of the reversion in fee in no way controlled or affected the devise of the estate tail.

I am, however, of opinion that the case at bar is distinguishable from *King v. Evans*. In that case, as has been seen, the words were "to hold in fee simple," which was held to be an expression of "known legal import," which could admit of no secondary or alternative meaning: *per* Strong, C.J. (p. 364), who added: "Then we have the inconsistent word 'issue,' and as we cannot reconcile the two, except by reading 'issue' in its secondary meaning as equivalent to 'children,' that must be done."

This reasoning is, I think, inapplicable to the language we have to construe, which is to the "respective issues in fee." The words "in fee" do not necessarily mean in fee simple. An estate tail is accurately described as a "fee tail," and the words may mean "in fee tail."* It is, therefore, unnecessary to give to the word "issue" any other than its primary meaning, *i.e.*, descendants, but, rather, effect should be given to both expressions if it is possible to do so, as I think it is.

I am of opinion, however, that the testator in this case has interpreted his own language and has shewn that he used the word "issue" as meaning "children." This appears, I think, from the words which follow the devise "to their respective issues." These words are: "So that the child or children of each will take his her or their mother's share but in case the said Jennie Campbell should die without issue then I give and devise her share thereof to the children of the said Marietta Weller alone share and share alike."

This provision shews, I think, that by "issue" the testator meant "children," for they it is who are to take their "mother's

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shar ' "Mother's share" is, no doubt, an inaccurate expression. What is meant by it is the undivided one-half in which their mother was given a life interest. Besides this, the gift over shews that it was in the sense I have mentioned that the word "issue" was used. But for the gift over, if Jennie Campbell had children, they, or at all events those of them who survived the testator, would have taken a vested remainder in that undivided half, and the gift over was designed to prevent this and to give the undivided one-half to the children of Marietta Weller if Jennie Campbell should leave no issue who should survive her.

The effect of the gift over is to give, in the event upon which it was to become operative, the undivided half in which Jennie Campbell was given a life interest to the children of Marietta Weller in fee simple, and the gift indicates that the testator thought that what he had previously given was given to "children." The use of the word "alone" in the gift over points in the same direction. It indicates, I think, that the testator in the earlier part of the will, as he understood what he had done, had given the remainder in fee in the undivided half in which their mother had been given the life interest to her children, and to guard against this he gives the whole to the children of Marietta Weller "alone."

As I understand the order of my brother Riddell, the life estate which Marietta Weller takes is an estate for her own life, though that is not expressed. It may be open to question whether the estate is not for the joint lives of herself and her sister Jennie Campbell and the survivor of them; but that question was not raised or argued, and I therefore say nothing further as to it.

For these reasons, I would affirm the judgment of my brother Riddell, and make the same directions as to the costs of the appeal that he made as to the costs of the motion before him.

Appeal dismissed.

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DAVEY v. CHRISTOFF.

Landlord and Tenant—Lease of Part of Building with Furniture and Equipment for Use as Theatre—Implied Warranty or Condition—Fitness for Human Habitation—Breach—Inadequacy of Heating Appliances.

In the case of a demise of real property only, a condition or warranty that it is fit for the purpose for which it is intended to be used will not be implied; but there is an exception to that rule in the case of a furnished house; and where the demise was not of realty only, but of the whole contents of part of a building used as a moving picture theatre, including seats, machinery, and equipment, the case was *held* to be one within the exception, and a warranty or condition that the theatre was fit for immediate occupation and use as a theatre was implied.

Review of the authorities.

Smith v. Marrable (1843), 11 M. & W. 5, and *Wilson v. Finch Hatton* (1877), 2 Ex. D. 336, followed.

Held, also, that the condition or warranty was broken; the letting being for a period covering the winter months, and the heating appliances being inadequate, the building was unfit for human habitation.

Judgment of MASTEN, J., 35 O.L.R. 162, affirmed.

APPEAL by the defendants from the judgment of MASTEN, J., 35 O.L.R. 162; and cross-appeal by the plaintiff as to the damages awarded to him, which, he contended, should be increased by \$200.

January 27. The appeal was heard by MEREDITH, C.J.O., GARROW, MACLAREN, MAGEE, and HODGINS, JJ.A.

W. A. Henderson, for the appellants.

J. W. Payne, for the plaintiff, respondent.

The arguments of counsel are sufficiently stated in the judgment. Counsel referred to some of the cases cited in the judgment, and also to *Naumberg v. Young* (1882), 44 N.J.L.R. 331; *McIntosh v. Wilson* (1913), 26 W.L.R. 91; *Miles v. Constable* (1914), 6 O.W.N. 362.

February 21. The judgment of the Court was delivered by MEREDITH, C.J.O.:—This is an appeal by the defendants from the judgment of Masten, J., dated the 17th December, 1915, pronounced after the trial before him sitting without a jury; and there is a cross-appeal by the plaintiff as to the damages which were awarded to him, which, he contends, should have been greater by \$200 than the amount which he was held to be entitled to recover.

The facts as to the main question are not seriously in dispute, and are simple:—

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The appellants were tenants of a moving picture theatre known as "The Temple," 1032 Queen street west, in the city of Toronto, which occupied the ground-floor of a building owned by a man named Vogan, and one of the terms of the tenancy was that the appellants were to heat the upper part of the building. The building was heated by means of a furnace or boiler which was situate in that part of the building of which the appellants became tenants. The appellants carried on the moving picture business for about eleven months, when they sublet the theatre to the respondent. The lease to the respondent is dated the 8th October, 1914, and is for two years from the 12th day of that month, and one of its terms is that he was to "keep the building other flats heated at his own expense."

Before deciding to take the lease on the terms offered by the appellants, the respondent visited the theatre on several occasions and satisfied himself that the business which was being done there warranted him in accepting the offer, and he told Begoin Christoff, one of the appellants, that he would accept it.

Nothing was said as to the heating of the building until the parties met to have the lease prepared and executed. In discussing the terms, Begoin Christoff told the respondent that he must agree to heat the upper part of the building. The respondent demurred to this, and asked how much coal it would take to heat the place, and the reply was either that three tons a month would be sufficient for that purpose or that the quantity the appellants had used was three tons a month. The respondent took possession on the 12th October, and was satisfied with the business until the cold weather came on, when it was found that the heating appliances were quite inadequate, not only to supply heat to the upper flats, but insufficient to heat the part of the building rented by the respondent. The result of this was that the attendance at the theatre fell off. Complaints as to the heating were made to the appellants, but they refused to do anything to remedy the defects in the heating appliances. The head landlord, Vogan, however, put in a new boiler; but this did not remedy the difficulty. The flue was too small and there was not sufficient draught. No effort was made by the appellants to remedy this defect, and on the 8th January, 1915, the respondent left the premises, and the lease was subsequently surrendered.

The action is brought to recover damages for the loss occasioned to the respondent owing to the insufficiency of the appliances for heating the premises, and in the statement of claim this was alleged to have been a breach of the appellants' covenant for quiet enjoyment. The appellants counterclaim for damages for "breach of covenant to pay rental and carry on the business" and for the respondent's refusal to transfer the license for the theatre to the appellants.

The claim that the defect in the heating appliances and the consequences of it constituted a breach of the covenant for quiet enjoyment was manifestly untenable, and the learned trial Judge so held, but he also held that there was an implied warranty that the heating appliances were adequate for heating the demised premises, and that there had been a breach of that warranty, and he awarded damages to the respondent in respect of it.

The learned Judge also awarded damages to the appellants on their counterclaim for the refusal to transfer the license, set off these damages against the damages awarded to the respondent, and gave judgment against the appellants for \$350 with costs.

The question as to the implication in such a case as this of a warranty that the demised premises are fit for the purpose for which they are intended to be used is an important one, and I have been unable to discover any direct authority in favour of implying such a warranty.

It is abundantly clear, I think, that such a warranty is not to be implied in the case of a demise of realty only.

In *Smith v. Marrable* (1843), 11 M. & W. 5, which was the case of letting a furnished house, Baron Parke, after stating that the case involved "the question whether, in point of law, a person who lets a house must be taken to let it under the implied condition that it is in a state fit for decent and comfortable habitation, and whether he (*sic*) is at liberty to throw it up, when he makes the discovery that it is not so," and referring to two earlier cases, *Edwards v. Etherington* (1825), Ry. & M. 268, 7 Dowl. & Ry. 117, and *Collins v. Barrow* (1831), 1 Moo. & Rob. 112, said: "These authorities appear to me fully to warrant the position, that if the demised premises are incumbered with a nuisance of so serious a nature that no person can reasonably be expected to live in them, the tenant is at liberty to throw them up."

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In *Sutton v. Temple* (1843), 12 M. & W. 52, which was the case of a demise of the eatage of twenty-four acres of land, it was held that on a demise of land or the vesture of land (as the eatage of a field) for a specific term at a certain rent, there is no implied obligation on the part of the lessor that it shall be fit for the purpose for which it is taken.

In *Hart v. Windsor* (1843), 12 M. & W. 68, which was the case of an agreement to let a house and garden ground, with the use of the fixtures therein, for the term of three years, the defendant pleaded that the house was demised to him for the purpose of his inhabiting it; that before and at the time of the agreement and when he entered, and from thence until and at the time of his quitting and abandoning the possession of it, the house was not in a fit state or condition for habitation, but in that state that the defendant could not reasonably inhabit or dwell therein or have any beneficial occupation of it, by reason of its being greatly infested with bugs, and not by reason of any act or default of the defendant; that before the rent or any part of it became due he quitted the possession, and gave notice thereof to the plaintiff, and ceased all further occupation of the same, and derived no benefit therefrom; and that, from the commencement of the term until his so quitting, he had had no beneficial occupation of the same. The jury having found for the defendant on this issue, it was held, on motion for judgment *non obstante veredicto*, that the plea was no answer to the action, inasmuch as the law implied no contract on the part of the lessor that the house was at the time of the demise, or should be at the commencement of the term, in a reasonably fit state and condition for occupation; secondly, that the demise being of a house and *garden ground*, in order to make the plea good, it must be held that, if a house be taken for habitation, and land for occupation, by the same lease, there is such an implied contract for the fitness of the house for habitation as that its breach would authorise the tenant to give up both; thirdly, that there is no implied warranty on a lease of a house, or of land, that it is or shall be reasonably fit for habitation, occupation, or cultivation; and that there is no contract, still less a condition, implied by law on the demise of real property only, that it is fit for the purpose for which it is let. The defendant in support of his plea relied chiefly upon *Smith v. Marrable*, and in delivering judgment Baron

Parke said that his judgment in that case certainly proceeded upon the authority of the two earlier cases I have mentioned, but that from the full discussion that they had undergone in argument, and in argument in the then recent case of *Sutton v. Temple (supra)*, he felt satisfied they could not be supported, if the reports of them were correct, and that all the members of the Court concurred in the opinion that they were not law.

In *Chappell v. Gregory* (1864), 34 Beav. 250, 252-3, the Master of the Rolls (Sir John Romilly) said: "A promise by the lessor to put the house into a complete state of repair before the lease is executed, and upon the faith of which the lease is taken, is a distinct engagement which must be fulfilled by him. But, in the absence of such a promise, a man who takes a house from a lessor, takes it as it stands; it is his business to make stipulations beforehand, and if he does not, he cannot say to the lessor, 'this house is not in a proper condition, and you or your builder must put it into a condition which makes it fit for my living in.' Accordingly, in the present case, unless the preliminary promise by Mr. Chappell is established by Mr. Gregory, he must fail; for not only is there no implied warranty in the letting of a house, but in this instance, the defendant had, himself, previously inspected the house, and knew, or had the opportunities of knowing, what the condition of it was."

In *Searle v. Laverick* (1874), L.R. 9 Q.B. 122, 131, Blackburn, J., said: "And we know that in the ordinary case of lessor and lessee there is no implied covenant on the part of the landlord to his tenant that the building shall be fit for the purpose for which it is let: see *Hart v. Windsor*" (*supra*).

The same Judge, then Lord Blackburn, said, in *Westropp v. Elligott* (1884), 9 App. Cas. 815, 826: "In the civil law and French law founded on it a lease of land was but one instance of the *locatio rei*, and according to that foreign law a contract on the part of the letter is implied that the thing, whether land or chattel, should be reasonably fit for the purpose for which it was let. There have been several cases in which the question has been discussed whether such a contract on the part of the letter was implied in English law. These cases, or most of them, will be found collected in Sir E. V. Williams' Notes to Saunders, vol. 2, 838. The decision in *Hart v. Windsor* was that there was no such contract on the part

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of the lessor of real property implied by English law. Now, in every case in which that question was raised, it must have been first decided that the property was let for a particular purpose."

In *Wilson v. Finch Hatton* (1877), 2 Ex. D. 336, 342, which was the case of a furnished house, Kelly, C.B., referring to the cases cited by the plaintiff's counsel, said that all of them were "cases of agreements for the letting and hiring of real property," and that "the circumstances in which furnished houses are, and those in which real property is, demised, differ very greatly." And Pollock, B., at p. 343, expressed the opinion that, "if this were the case of an agreement for the letting of real property, the well-established rules of law would apply, and they would force us to hold that the tenant could not succeed in this case;" and on p. 344 he said: "The cases which refer to real property do not govern this contract."

In *Manchester Bonded Warehouse Co. v. Carr* (1880), 5 C.P.D. 507, 510, 511, which was the case of a lease of floors in a warehouse, Lord Coleridge, C.J., delivering the judgment of the Court, said: "We are of opinion that the plaintiffs are not liable to damages by reason of any implied covenant or warranty by them that the building was fit for the purpose for which it was to be used. No authority has been found which decides that there is any such warranty; what authority there is on the point is against its existence: *Hart v. Windsor*; *Sutton v. Temple*; and we are of opinion that no such warranty can be implied. There are, it is true; some cases relating to furnished apartments and houses which tend to shew that a person who lets them impliedly warrants that they are fit for residential purposes: *Smith v. Marrable* and *Wilson v. Finch Hatton*; but we are not prepared to extend these decisions to ordinary leases of lands, houses, or warehouses, as we must if we are to hold the plaintiffs liable for the fall of this warehouse by reason of any implied covenant or warranty."

This rule was also recognised and acted upon, and *Sutton v. Temple* and *Hart v. Windsor* were followed, in *Murray v. Mace* (1874), 8 I.R. C.L. 396, and in the leading text-books on the subject of landlord and tenant; and in Halsbury's Laws of England the rule is stated to be as laid down in those two cases. In the United States, also, the rule is recognised and acted upon: Cyc., vol. 24, pp. 1048, 1049.

The only case in which any doubt may be thought to have been suggested as to the application of the rule to the letting of an unfurnished house which, to the knowledge of the lessor, is taken for immediate habitation, is *Bunn v. Harrison* (1886), 3 Times L.R. 146. That was the case of an agreement for the lease of an unfurnished house, and it had been found by the trial Judge that the defendant had been induced to become tenant of the house on the faith of a representation and warranty that it was in a sanitary condition, and that the drainage, water supply, and ventilation were all perfect; that the house was at the time of the letting in an insanitary condition, and that the defendant had left within a reasonable time; and the plaintiff's action, which was brought to recover a quarter's rent, was dismissed, and judgment was given for the defendant on her counterclaim for breach of the warranty. The plaintiff appealed, and upon the appeal the defendant's counsel relied upon the express warranty, and also contended that, as the house was for immediate habitation, there was an implied warranty that it was fit for habitation. The appeal was dismissed upon the ground that the warranty that was found to have been given was "not only . . . a warranty, ordinarily so called, but also a warranty which went to the whole root and condition of the contract;" that it was a condition; that there were, therefore, a condition and a warranty; that the condition upon which the defendant was to take the house was broken, and she was not bound to pay the rent, "as she did not take to the house, but left within a reasonable time," and that there was a breach of the warranty upon which she could recover damages. As to the question of an implied warranty, the Master of the Rolls reserved his opinion until the case arose. Lindley, L.J., said that "it was not necessary to decide whether or not the doctrine of *Smith v. Marrable* and *Wilson v. Finch Hatton* applied, where it was understood by both parties that the unfurnished house was for immediate habitation;" and Lopes, L.J., said that "it was not necessary to express any opinion as to implied warranty in the case of unfurnished as distinct from furnished houses."

Notwithstanding what was said in this case, in my opinion *Sutton v. Temple* and *Hart v. Windsor* ought to be followed, and, if followed, there is nothing to exclude from the application of the rule there laid down the case of an unfurnished house let for im-

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mediate habitation; and it follows from the rule that the doctrine of such cases as *Hamlyn & Co. v. Wood & Co.*, [1891] 2 Q.B. 488, does not apply.

An exception has been made to the rule in the case of furnished houses or apartments let for immediate and temporary occupation, but it is difficult to understand the exact ground upon which the exception is based. It was first applied in *Smith v. Marrable* (*supra*). The letting in that case was of a furnished house for five or six weeks at the option of the tenant, and was for immediate occupation by him. The tenant, who at once entered into possession, finding that the house was infested with bugs, left it and sent the key with a week's rent to the landlord. The landlord sued for use and occupation, claiming to recover a balance of five weeks' rent, and the defence was that there was an implied condition or warranty that there was nothing about the house so noxious as to render it uninhabitable, and the Lord Chief Baron, before whom the action was tried, so directed the jury. A motion for a new trial on the ground of misdirection was made by the plaintiff, but a rule was refused.

As I have already said, Baron Parke based his judgment on the earlier cases I have mentioned, and would have decided in favour of the defendant even if the house had not been a furnished house; but Lord Abinger, C.B., apparently confined his decision to the case of a furnished house, and said: "A man who lets a ready-furnished house surely does so under the implied condition or obligation—call it which you will—that the house is in a fit state to be inhabited. Suppose, instead of the particular nuisance which existed in this case, the tenant discovered the fact—unknown perhaps to the landlord—that lodgers had previously quitted the house in consequence of having ascertained that a person had recently died in it of plague or scarlet fever; would not the law imply that he ought not to be compelled to stay in it? I entertain no doubt whatever on the subject, and think the defendant was fully justified in leaving these premises as he did: indeed, I only wonder that he remained so long, and gave the landlord so much opportunity of remedying the evil."

In *Sutton v. Temple* (*supra*), it was sought to apply the decision in *Smith v. Marrable*, but Lord Abinger (p. 60) distinguished it on the ground that the contract in that case was a contract of a

mixed nature—for the letting of a house *and furniture* at Brighton, and said that every one knew that the furniture, upon such occasions, forms the greater part of the value which the party renting gives for the house and its contents. “In such a case,” said he, “the contract is for a house and furniture fit for immediate occupation; and can there be any doubt that, if a party lets a house, and the goods and chattels or the furniture it contains, to another, that must be such furniture as is fit for the use of the party who is to occupy the house?” And, after referring to some cases by way of illustration, he added (p. 61): “On the same principle, if a party contract for the lease of a house ready-furnished, it is to be furnished in a proper manner, and so as to be fit for immediate occupation. Supposing it turn out that there is not a bed in the house, surely the party is not bound to occupy it or to continue in it. So also in the case of a house infested with vermin; if bugs be found in the bed, even after entering into possession of a house, the lodger or occupier is not bound to stay in it Where the party has had an opportunity of personally inspecting a ready-furnished house by himself or his agent before entering on the occupation of it, perhaps the objection would not arise; but if a person take a ready-furnished house upon the faith of its being suitably furnished, surely the owner is under an obligation to let it in a habitable state. Common sense and common justice concur in that conclusion. On this ground, I put the case of *Smith v. Marrable* out of the question in the present case, from which it is materially distinguishable.”

Baron Parke said (p. 65) that *Smith v. Marrable* was distinguishable on the ground upon which the Lord Chief Baron had put it: “that there the contract was of a mixed nature, being a bargain for a house *and furniture*, which was necessarily to be such as was fit for the purpose for which it was to be used. It resembles the case of a ready-furnished room in an hotel, which is hired on the understanding that it shall be reasonably fit for immediate habitation. In such case the bargain is not so much for the house as the furniture, and it is well understood that the house is to be supplied with fit and proper furniture, and that, if it be defective, the landlord is bound to replace it.”

Gurney, B. (pp. 65, 66), concurred with some difficulty, because he thought it not easy to distinguish the case from *Smith*

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v. *Marrable*: but said that, as it related to land, and not also to goods and chattels, it might admit of some distinction.

Rolfe, B. (p. 67), thought it very probable that the two cases might be distinguished, on the ground pointed out by the Chief Baron and Baron Parke, but that if they were not be would prefer at once to overrule *Smith v. Marrable*, rather than to follow it in the case he was dealing with.

In *Hart v. Windsor (supra)*, *Smith v. Marrable* was again relied on, and was again distinguished on the ground on which it was put by Lord Abinger, "both on the argument of the case itself, but more fully in that of *Sutton v. Temple*; for it was the case of a demise of a ready-furnished house for a temporary residence at a watering-place. It was not a lease of real estate merely" (p. 87).

In *Wilson v. Finch Hatton (supra)*, the exception was carried a step farther. There the defect was in the drainage of a furnished house let for a temporary period and for immediate occupation, and it was held that there is in an agreement to let a furnished house an implied condition that the house shall be fit for occupation at the time at which the tenancy is to begin, and that if the condition is not fulfilled the lessee is entitled thereupon to rescind. The Lord Chief Baron came to that conclusion both on the authority of *Smith v. Marrable* and "on the general principles of law."

Pollock, B., distinguished the case from one in which the subject of the demise was real property, and said that: "Although in the case of a furnished house many of the incidents which attach to a demise of realty may be applicable, inasmuch as the rent does, in a sense, issue out of the realty, still the rent paid for a furnished house such as this is not merely rent for the use of the realty, but a sum paid for the accommodation afforded by the use of the house, with all its appurtenances and contents, during the particular period of three months for which it is taken." The learned Baron, apart from authority, thought it clear that the plaintiffs had "not supplied to the tenant that which both parties intended they should supply," and that the tenant then had "done what she was entitled to do, as she repudiated the contract without delay. . . . " and that *Smith v. Marrable* was good law and furnished the Court with an authority for its decision. The real principle, he said, of *Smith v. Marrable* was unassailed, and he thought was unassailable, "for, as is said in the judgment of Lord Abinger: 'A

man who lets a ready-furnished house, surely does so under the implied condition or obligation that the house is in a fit state to be inhabited;" and he added: "It has been assumed, too, that it was the furniture and not the house that was infested; but it would seem that that was not the case, and that the animals were found in both." This latter statement is supported by the report of *Smith v. Marrable*, although, as I read Lord Abinger's reasons for judgment, he emphasised the fact that the difficulty complained of was in the furniture.

It is also to be noticed that in *Wilson v. Finch Hatton*, before the agreement was signed, the defendant wrote to the plaintiff's agent to make inquiries as to the state of the drainage, and that the agent wrote in reply that "Mrs. Hale" (*i.e.*, the person for whom the house was held by the plaintiffs as trustees) "believes the drainage to be in perfect order."

I refer also to *Bird v. Lord Greville* (1884), Cab. & El. 317; *Harrison v. Malet* (1886), 3 Times L.R. 58; *Charsley v. Jones* (1889), 53 J.P. 280, 5 Times L.R. 412; *Sarson v. Roberts*, [1895] 2 Q.B. 395; and *Campbell v. Wenlock* (1866), 4 F. & F. 716, in which Cockburn, C.J. (p. 734), told the jury that "upon principles of law, there was an implied contract that a furnished house, let for present occupation, should be fit for such occupation."

After much consideration, I have come to the conclusion that the letting in the case at bar comes within the exception established by *Smith v. Marrable* and *Wilson v. Finch Hatton*, and that there is to be implied a warranty or condition in the contract between the parties that the theatre was fit for immediate occupation and use as a moving picture theatre.

The property demised was not realty only, but there were included in the demise the whole contents of the theatre, "including 387 seats, more or less, piano, machines, and all other necessary equipment for the operation of the theatre." The demise resembles in its essential features that of a furnished house; it was of a furnished theatre, the whole let as a going concern and for immediate occupation and use as a moving picture theatre. The condition or warranty that it was fit for occupation and use as a moving picture theatre was undoubtedly broken. In a climate such as that of Ontario there can be no doubt, I think, that if there were no adequate heating appliances in a furnished house

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intended to be heated by steam or hot water or air, and let for a period covering the winter months, the house would be unfit for human habitation within the decision in *Smith v. Marrable*, and I can see no difference between such a case and that of a furnished moving picture theatre let for immediate occupation and use.

My view that a warranty or condition that the premises demised were fit for immediate occupation and use as a moving picture theatre should be implied is, I think, strengthened by the provision of the lease requiring the respondent to heat the upper flats and by the discussion which took place as to the quantity of coal which was required to do the heating—which indicates that the parties were dealing with premises that were supplied with adequate heating appliances. Indeed, if it were not for the finding to the contrary of the learned trial Judge, I should have thought that the evidence warranted the conclusion that there was an express warranty that not more than three tons of coal per month would be required to heat the theatre and the upper flats, and that there was a breach of that warranty.

I would, for these reasons, dismiss the appeal with costs, and affirm the judgment of the learned trial Judge.

No case was made for disturbing the disposition made of the claim of the appellants for damages for the refusal of the respondent to transfer the license; \$200 were awarded for these damages, and, upon the finding of fact made by the learned Judge upon this branch of the case, were rightly awarded; and the cross-appeal should, therefore, be dismissed with costs.

I have written at greater length than I should have written but for the importance of the question of law involved in the determination of the appeal, and a desire that nothing should be said by the Court which would tend to unsettle the well-established rule of law that, in the case of a demise of real property only, a condition or warranty that it is fit for the purpose for which it is intended to be used will not be implied.

Appeal dismissed.

[APPELLATE DIVISION.]

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Will—Construction—Payment of Mortgage-debts—Direction to Pay out of Fund Arising from Sale of Property, Real and Personal—Wills Act, R.S.O. 1914, ch. 120, sec. 38—Primary Liability of Real Estate Charged—"Contrary or other Intention"—Creation of "Mixed Fund"—Ratable Contribution—Life Estate.

The testator (dying in 1911) by his will devised and bequeathed the whole of his estate, which comprised both real and personal property, to trustees, upon trust, as soon as convenient after his death, to convert into money such parts of his estate as should not consist of money, "except as is herein otherwise provided for;" and then directed the trustees to pay his debts and funeral and testamentary expenses "and any charge by way of mortgage that may be against my property at the time of my death?"—

Held, that, the trustees being directed to pay the testator's debts, including his mortgage-debts, and the only fund available to them for that purpose being the proceeds of the sale of the property which they were directed to convert into money, the direction to pay was a direction to pay out of that fund; and the testator had by his will signified the "contrary or other intention" necessary to displace what otherwise would have been the effect of sec. 38 of the Wills Act, R.S.O. 1914, ch. 120, viz., that the mortgaged real estate should be primarily liable.

Hewell v. Whitaker (1827), 3 Russ. 343, followed.

The direction to convert as soon as convenient was subject to an exception—"except as herein is otherwise provided for;" but that referred to a subsequent direction that land devised to the testator's wife for life should not be sold in her lifetime without her consent.

The fund which the testator had created was a mixed fund; and the burden of the charge must be contributed to ratably by the personality and realty from which the fund was to be derived, i.e., the whole of the real and personal estate except the life estate devised to the wife.

The rule stated in Jarman on Wills, 6th ed., p. 2033, as to the creation and disposition of a mixed fund, adopted.

Judgment of BRITTON, J., varied.

MOTION by the executors of Honoré Le Brun, deceased, upon originating notice, for an order determining certain questions as to the proper construction of the will of the deceased.

September 29, 1915. The motion was heard by BRITTON, J., in the Weekly Court at Toronto.

J. R. Corkery, for the executors.

George F. Shepley, K.C., for the widow of Carisse Le Brun.

J. M. Ferguson, for the widow of the testator.

H. E. Rose, K.C., for the sisters of Carisse Le Brun.

E. C. Cattnach, for the Official Guardian.

December 23, 1915. BRITTON, J.:—The testator, Honoré Le Brun, made his last will on the 23rd day of January, 1911, and

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died on the same day. Probate was granted by the Surrogate Court of the County of Peterborough to John Corkery, executor, and Marie Louise Le Brun, widow of the testator, executrix of the said will. Leaving out the merely formal parts, the will reads as follows:—

(1) “I appoint my wife Marie Louise Le Brun, my friend and partner Joseph Picard, and John Corkery, Deputy Postmaster, the executrix and executors and trustees of this my will.

(2) “I devise and bequeath to my said trustees, their executors and administrators, all my estate, real, personal, and mixed, and wheresoever situated, or to which I shall at my death be possessed of or entitled to, upon trust that the said trustees or the survivor of them or the executors or administrators of such survivor shall, as soon as conveniently may be after my death, call in, sell, and convert into money such parts thereof as shall not consist of money, except as is herein otherwise provided for, by public auction or otherwise, and upon such terms and conditions as they shall see fit.

(3) “I direct my said trustees to pay my just debts and funeral and testamentary expenses, and any charge by way of mortgage that may be against my property at the time of my death.

(4) “I direct my said trustees to give to my wife for her sole use absolutely all articles of personal or domestic use or ornament, except as is hereinafter mentioned for my brother Carisse, including my furniture, books and pictures and all household effects which at the time of my death shall be in and about the house in which I may reside at my decease, and in and about my summer residence at Stoney Lake, known as ‘Bellechasse.’

(5) “I direct my said trustees or the survivor of them to hold my property at Simcoe street in the city of Peterborough, and being parts of lots numbers eighteen and nineteen north of Simcoe street aforesaid, described as follows” (describing it by metes and bounds).

(6) “Secondly my island and summer cottage known as ‘Bellechasse,’ and being island number forty according to T. R. Hewson’s plan of Stoney Lake and Islands, for the township of Dummer, in the county of Peterborough, for the benefit of my said wife during her lifetime.

(7) “And after the death of my said wife I direct my said

trustees for the time being of this my will to sell said parts of lots numbers eighteen and nineteen as have not been previously disposed of at a price and on terms as my said trustees shall see fit, and the proceeds derived from the sale of said lastly mentioned property to divide in equal shares amongst my brother Carisse, his wife Alphonsine Le Brun, my sisters who shall be alive at the date of the death of my wife, and my nephew, the son of my brother Carisse, the last share to be set apart and invested by my said trustees for the benefit of my nephew until he attains the age of twenty-one years. My brother's share however to go to his wife should he predecease her, and her share to him should she predecease him.

(8) "I direct my said trustees, as soon as may be convenient, to sell and dispose of the said island number forty, on such terms and for such price as my trustees shall deem advisable.

(9) "I direct the sum of five hundred dollars (\$500) to be given to my step-daughter Bernadotte Hackett, for her own use absolutely.

(10) "I hereby authorise and empower the trustees for the time being acting under this my will to sell and convey such parts of the trust premises held by them, or the survivors of them, for the benefit of my wife, as herein provided for, but only with the consent of my wife, if sold in her lifetime, the proceeds of such sale or sales to be invested by my trustees for the benefit of my wife during her lifetime.

(11) "And I authorise and empower my trustees for the time being of this my will to sell and dispose of my interest in the partnership business at present carried on by me and the said Joseph Picard at the city of Peterborough, under the firm name of 'H. Le Brun & Company,' for the price and upon terms they may deem best and most advantageous to my estate, with the option, however, to my said partner, of purchasing said interest should he so desire and express himself in writing, it being my wish that he should be given an opportunity prior to any other person of purchasing said interest, and I direct my said trustees, should the said Joseph Picard notify them in writing, within sixty days from the date of my death, of his wish to purchase my interest in said business, to dispose of the same to him, and to give him four years within which to pay for said interest should he

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require it, same to be paid for in four equal annual instalments with interest on the unpaid purchase-money at the rate of four per cent. per annum. The value of my interest to be determined by mutual consent, if possible by my trustees, and according to the terms of the articles of said partnership at the time of my death, as if the said partnership had at that date been dissolved by mutual consent. And in case of any dispute or difference as to the value of said interest, I direct same to be settled and determined on by three practical men, one to be named by each of my said trustees.

(12) "I direct my said trustees to divide the proceeds from the sale of said partnership business and all accumulations of interest on the same, within three months from the date that my trustees for the time being of this my will shall have received the whole of the proceeds from the sale of my interest in said partnership, as follows: one half of said proceeds to be invested for the benefit of my wife during her lifetime, and the other half to be divided in equal shares between my brother Carisse, his wife, and my sisters who shall be alive at the date such division is to be made.

(13) "And as to the rest and residue of my estate, the same is to be divided equally between my brother Carisse, his wife Alphonsine, my nephew their son, and such of my sisters as shall be alive at the date of the death of my wife, it being my intention that should either of the said legatees die before the period of distribution of the proceeds from the sale of said business, that the same shall be divided amongst the survivor or survivors of them, except in the case of my brother Carisse, or his wife Alphonsine, dying, then the share of the one so dying is to be given to the survivor of them, and the share of my nephew is to be set apart and invested by my trustees for the time being until he arrives at the age of twenty-one years, the interest of such investment to be used by my said trustees, should they see fit, for the benefit and education of my nephew.

(14) "I direct my trustees to give to my brother Carisse my watch and the rest of my jewellery and my clothes.

(15) "I direct my trustees for the time being, as long as any of my household property remains unsold, to keep the same in good order and proper repair, in the same manner as it has been heretofore kept by me, deducting the cost of such repairs and up-

keep from the revenues and rents derived therefrom, before disposing of same, as is hereinbefore provided for.

(16) "I direct my trustees to purchase a lot in the Roman Catholic Cemetery, in the township of North Monaghan, in which my body is to be interred, and to erect a monument to my memory, the cost of such lot and monument not to exceed the sum of \$400.

(17) "In the event of any difference of opinion or dispute between my trustees for the time being of this my will, I direct that the wishes and rulings of the majority shall be final, and in the event of the death of one of my trustees, prior to the death of my wife, I direct that the two survivors shall appoint a third to act with them, and in the event of their being unable to agree on the choice, that His Honour the County Judge for the time being for the County of Peterborough be asked to appoint a trustee to act in the place of the one dying."

It appears, according to the affidavit of John Corkery, executor, filed on this application, that doubts have arisen and difficulties have been experienced by the executors in executing the trusts created by the said will; and the following questions have been submitted to the Court:—

1. "The undisposed of personalty of the estate not being sufficient to pay the debts, mortgage-charges, cost of monument, etc., is the deficiency to be met by the personal estate disposed of by the will, with a consequent abatement of the legacies; or should the deficiency be borne by the mortgaged real estate? Further, should the mortgage interest already paid, that due, and that to become due, be paid by the life-tenant out of revenue derived from the property?

2. "Was it the testator's intention to make island forty subject to the direction given regarding the Simcoe street property? (See paragraphs 5 and 6.)

3. "The deceased intended his sisters to share in the proceeds of partnership assets. Are the sisters entitled to share, those who are alive at the time of the distribution of the proceeds, or those alive at a date three months after the trustees have received the whole of the proceeds from the sale of the partnership interest? (See paragraph 12.)

4. "Has the share of Carisse Le Brun, now dead, vested in his estate or in his wife?

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5. "Should the remuneration of the executors, fixed at \$450 for the period from the 1st October, 1912, to the 1st May, 1915, be borne partly by corpus and partly by income?"

The questions should be answered as follows:—

1. Section 38 of the Wills Act, R.S.O. 1914, ch. 120, applies. There is nothing in this will that constitutes a clear intention that the mortgage-debts are to be paid out of some fund other than the mortgaged lands or the proceeds thereof. In other words, the answer to the question, as framed, will be that the deficiency will be borne by the mortgaged real estate. The interest upon these mortgages—that already paid and that to be paid—must be paid by the life-tenant out of the revenues from the mortgaged property.

2. Yes. Paragraphs 5 and 6 of the will appear to me to deal with both properties in the same way.

3. This question involves the construction of paragraphs 12 and 13 of the will. Paragraph 12 deals with the testator's interest in the partnership business and assets of the business carried on by the testator at the time of his death. Paragraph 13 deals first with the residue of the testator's entire estate, and then deals further with the partnership business and assets. Reading paragraph 12 and part of 13 together, it will be as follows: "I direct my said trustees to divide the proceeds from my partnership business and all accumulations and interest on the same, within three months from the date that my trustees for the time being of this my will shall have received the whole of the proceeds from the sale of my interest in the said partnership: one half of said proceeds to be invested for the benefit of my wife during her lifetime, and the other half to be divided in equal shares between my brother Carisse, his wife, and my sisters who shall be alive at the date such division is to be made."

Paragraph 13, "As to the rest and residue of my estate," *i.e.*, the entire residue, including the proceeds of the partnership, in which the wife had a life interest, it is to be divided as stated in paragraph 13—a different division from that mentioned in paragraph 12—and further providing for survivorship in the case of Carisse, the brother of the testator, and the wife of the said brother.

The answer, therefore, to the third question will be that the

sisters entitled to share in the proceeds from the partnership business are those alive at the time fixed for distribution of the proceeds of the said business.

4. The share of Carisse, according to the express provision in the will, will go to his wife. Carisse died before the time for distribution. His wife survived her husband, and was alive at the time fixed for distribution.

5. The remuneration of the executors, fixed at \$450 for the period from the 1st October, 1912, to the 1st May, 1915, should be paid one half from the corpus of the estate and one half from income.

Costs of this application, of all parties, to be paid out of the corpus of the estate; the costs of the executors as between solicitor and client.

The widow of the testator appealed from the judgment of BRITTON, J.

January 28, 1916. The appeal was heard by MEREDITH, C.J.O., GARROW, MACLAREN, MAGEE, and HODGINS, JJ.A.

J. M. Ferguson, for the appellant, argued that the testator's widow took the estate devised to her, free from the obligation to pay the mortgage-debts thereon, and that the case came within the exception in the Wills Act, sec. 38, by which the general rule is reversed where the testator has "signified any contrary or other intention." He referred to *In re Banks, Banks v. Busbridge*, [1905] 1 Ch. 547, and contended that the provisions of the will shewed that the testator's intention was to exonerate from the mortgages the estate devised to the appellant. He also referred to *In re Valpy, Valpy v. Valpy*, [1906] 1 Ch. 531; *In re Fleck, Colston v. Roberts* (1888), 37 Ch.D. 677, 679; *Scott v. Supple* (1893), 23 O.R. 393.

E. C. Cattanach, for the Official Guardian, adopted the argument of counsel for the appellant.

H. E. Rose, K.C., for the sisters of Carisse LeBrun, respondents, argued that the testator had not signified a contrary intention within the meaning of sec. 38, referring to Theobald on Wills, Canadian edition, p. 155. There is no direction to pay the mortgage-debts out of any particular fund, which is necessary in

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order to free the realty from the burden of the mortgages. He referred to *Pembroke v. Friend* (1860), 1 J. & H. 132; *Woolstencroft v. Woolstencroft* (1860), 2 De G. F. & J. 347, 350; *Brownson v. Lawrance* (1868), L.R. 6 Eq. 1. The *Valpy*, *Fleck*, and *Scott* cases are distinguishable on the facts.

H. S. White, for the widow of Carisse Le Brun, adopted the argument of counsel for the sisters.

Ferguson, in reply, referred to *Mason v. Mason* (1887), 13 O.R. 725.

February 21, 1916. The judgment of the Court was delivered by MEREDITH, C.J.O.:—This is an appeal by the widow of the testator, Honoré Le Brun, from the order dated the 23rd December, 1915, made by Britton, J., on an originating motion for the construction of the will of the testator.

The will is dated the 23rd January, 1911, and by it the appellant, Joseph Picard, and John Corkery, are appointed executrix and executors and trustees. The whole estate of the testator is devised and bequeathed to the trustees, upon trust, as soon after his death as conveniently may be, to call in, sell, and convert into money such parts of it as should not consist of money, "except as is herein otherwise provided for . . ." Then follows a direction to the trustees "to pay my just debts and funeral and testamentary expenses, and any charge by way of mortgage that may be against my property at the time of my death."

The testator then directs the trustees to give to his wife, for her sole use absolutely, certain chattel property, including his household effects.

He then directs the trustees to hold his property on Simcoe street, in the city of Peterborough, and his island and summer cottage, for the benefit of his wife during her lifetime, and after her death to sell them and to divide the proceeds of the sale in equal shares "amongst" his brother Carisse, his, *i.e.*, the brother's, wife, Alphonsine Le Brun, and the testator's nephew, son of Carisse, and he directs that if his brother predeceases his wife she is to have her husband's share.

Then follows a direction to the trustees, as soon as may be convenient, to sell the island.

He next directs that \$500 be given to a step-daughter.

Then follows an authority to the trustees to sell the property held by them for the benefit of the appellant, but only with her consent if sold in her lifetime, and a direction to invest the proceeds of the sale for the benefit of his wife during her lifetime.

Next is an authority to the trustees to sell the testator's interest in the business he was carrying on in partnership with Joseph Picard, who, he directs, shall have the option of purchasing it, and if he should buy he is to be allowed to pay the purchase-price in four equal annual instalments with interest at four per cent. per annum.

By the next paragraph provision is made for the disposition of the proceeds of the sale of the interest in the partnership business, and it is directed that one half of the proceeds be invested for the benefit of the appellant during her lifetime and the other half be divided in equal shares between the testator's brother Carisse, his wife, and the testator's sisters who should be alive when the division is made, the time for which is fixed at three months after the trustees shall have received the whole of the proceeds of the sale.

Then follows the disposition of the residue, which is to be divided between the brother Carisse, his wife Alphonsine, their son, the testator's nephew, and such of his sisters as should be alive at the date of the death of the appellant, it being the testator's intention, as the paragraph states, that "should either of the said legatees die before the period of distribution of the proceeds from the sale of said business, that the same shall be divided amongst the survivor or survivors of them, except in the case of my brother Carisse, or his wife Alphonsine, dying, then the share of the one so dying is to be given to the survivor of them . . ." Following the residuary disposition is a direction to the trustees to give to Carisse the testator's watch and the rest of his jewellery and his clothes. The testator then provides for the repair and upkeep of his "household property" (meaning no doubt his houses) by the trustees, who are to deduct the outlay from the revenues and rents derived from the property.

The next provision is a direction to the trustees to purchase a lot in a cemetery and to erect a monument to the testator's memory, the cost of both not to exceed \$400.

The last provision is as to the mode of settling differences of opinion or disputes between the trustees.

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When the will was made and at the time of the testator's death, the land in Peterborough was incumbered by mortgages made by him, upon which there remained unpaid \$11,100.

The sale of the testator's interest in the partnership realised, including accumulations of interest, \$7,082.34.

Since the death of the testator, the trustees have paid off all the mortgages except one for \$3,000.

The debts and funeral and testamentary expenses (not including mortgage-debts), amounting to \$3,161.70, have been paid by the trustees, and the undisposed-of personal property is of trifling value. It consists of one share in a golf company and five shares in a lock company, together of the nominal value of \$510, but of which the trustees have as yet been unable to dispose.

The island lot "and chattels" have been sold for \$2,000, and the furniture and household effects there have been sold for \$400; and this latter sum has been paid to the appellant. She has also received \$592.62, the proceeds of the sale of part of the furniture and household effects and books and pictures which were at the time of his death in the testator's residence in Peterborough. It would appear from the accounts that the trustees have collected the rents of the Peterborough property and have made payments from time to time to the appellant out of the money so collected.

The contest is as to how the mortgage-debts are to be paid, the contention of the respondents being that the land devised passed to the devisee *cum onere*, and to that contention my brother Britton gave effect.

The contention of the respondents is, that there is nothing in the will to shew a contrary intention within the meaning of the provisions of sec. 38 of the Wills Act, R.S.O. 1914, ch. 120*, which

* 38.—(1) Where any person has died since the 31st day of December, 1865, or hereafter dies, seised of or entitled to any estate or interest in any real estate, which, at the time of his death, was or is charged with the payment of any sum of money by way of mortgage, and such person has not, by his will or deed or other document, signified any contrary or other intention, the heir or devisee to whom such real estate descends or is devised shall not be entitled to have the mortgage-debt discharged or satisfied out of the personal estate, or any other real estate of such person, but the real estate so charged shall, as between the different persons claiming through or under the deceased person, be primarily liable to the payment of all mortgage-debts with which the same is charged, every part thereof according to

correspond with the provisions of the English Act known as Locke-King's Act and the amendments made to it since the original Act was passed; and the argument is, that in order to take a case out of sec. 38 the testator must have created or designated a fund out of which the mortgage-debts are to be paid, and constituted it the primary fund for paying them, and that that has not been done by the testator whose will is now in question.

I am unable to agree with this contention. In my opinion, the testator has by his will signified the contrary or other intention necessary to displace what otherwise would have been the effect of the section.

The trustees are directed to pay the testator's debts, including his mortgage-debts. The only fund available to them for that purpose is the proceeds of the sale of the property which they are directed to convert into money, and the direction to pay is, therefore, in my opinion, a direction to pay out of that fund.

The effect of a general direction by the testator that his debts shall be paid charges them on the real estate devised by his will: Jarman on Wills, 6th ed., p. 1990.

The leading authority for this proposition is *Legh v. Earl of Warrington* (1733), 1 Bro. P.C. 511.

Even in the case of an executor, a direction to him to pay debts, if he is devisee of real estate, will cast them on the realty so devised: Jarman on Wills, 6th ed., p. 1993.

The reasoning upon which this conclusion is reached appears from what was said by the Master of the Rolls (Sir John Leach)

its value bearing a proportionate part of the mortgage-debts charged on the whole thereof.

(2) In the construction of a will to which this section relates, a general direction that the debts, or that all the debts, of the testator shall be paid out of his personal estate, or a charge or direction for the payment of debts upon or out of residuary real estate and personal estate or residuary real estate shall not be deemed to be a declaration of an intention contrary to or other than the rule in sub-section 1 contained, unless such contrary or other intention is further declared by words expressly or by necessary implication referring to all or some of the testator's debts charged by way of mortgage on any part of his real estate.

(3) Nothing herein shall affect or diminish any right of the mortgagee to obtain full payment or satisfaction of his mortgage-debt, either out of the personal estate of the person so dying or otherwise; and nothing herein shall affect the rights of any person claiming under any will, deed or document made before the first day of January, 1874.

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in *Henvell v. Whitaker* (1827), 3 Russ. 343. In that case the testator directed that his debts and funeral expenses should be paid by his executor thereafter named, and by a subsequent provision of the will all the testator's real and personal property was devised and bequeathed to the nephew William Whitaker, who was named as executor. In delivering judgment the Master of the Rolls said: "When the testator in his will directs that all his just debts and funeral expenses be fully paid by his executor thereafter named, it must be intended that he had then fully determined who that executor should be; and the will is to be construed as if he had said, 'I direct that my just debts and funeral expenses be paid by my nephew William Whitaker, whom I hereinafter name my executor.' In such case the obligation to pay his debts and funeral expenses would be a condition imposed upon the nephew William Whitaker, to be satisfied as far as the property, which he derived under the will, would extend, whether personal or real."

The application of this rule to the will in question in the case at bar leads to the conclusion that it is out of the fund which is to come to the hands of the trustees, viz., the proceeds of the sale of the property which they were directed to convert into money, that the payment which they are to make is to be made.

The direction to convert as soon as conveniently may be is subject to an exception in these words, "except as is herein otherwise provided for," which I understand to refer to the subsequent direction that the land devised to the appellant for life is not to be sold in her lifetime without her consent, and possibly to the subsequent direction that his partner is to have the option to purchase the testator's share in the partnership business which he and Joseph Picard were carrying on. The language of the exception is more appropriate to the time and manner of selling than to the subject of the sale, and the exception, in my opinion, has reference to the former and not to the latter.

The conclusion being that the fund to be created by the conversion which the trustees are directed to make is a fund out of which his funeral and testamentary expenses and his debts, including mortgage-debts, are to be paid, the next question is as to how these are to be borne by the beneficiaries.

The rule of law, as I understand, is that, "where a testator creates out of real and personal estate a mixed fund to answer

certain charges, he is considered as intending, not that the personalty shall be the primary fund and the realty the auxiliary for those charges, but that each shall contribute ratably to the common burden. And it is immaterial that the combined fund comprises the whole of the testator's real and personal estate:" Jarman on Wills, 6th ed., p. 2033.

It is not sufficient to exempt the personal estate from its primary liability that the real and personal estate are given together "out of the issues, dividends, interest and profits thereof to pay debts, legacies or annuities," but to effect that purpose "there must be a direction for the sale of the real estate, so as to throw the two funds absolutely and inevitably together to answer the common purposes of the will:" *per* Sir G. Turner, L.J., in *Tench v. Cheese* (1855), 6 DeG. M. & G. 453, 467; Jarman on Wills, 6th ed., p. 2033.

The fund which the testator in this case has created is a mixed fund within the meaning of the rule, for he has directed the sale of the real estate, and therefore the burden of the charge must be contributed to ratably by the personalty and realty from which the fund is to be derived, which is, in my opinion, the whole of the real and personal estate except the life estate devised to the appellant.

I would, for these reasons, vary the order appealed from by striking out the first paragraph and substituting for it a declaration that, according to the true construction of the will:—

1. The funeral and testamentary expenses and the debts of the testator, including his mortgage-debts, are payable out of the proceeds of the real and personal estate which the trustees are directed to sell and convert into money, upon which they are charged.

2. That these proceeds form a mixed fund for the payment of the funeral and testamentary expenses and debts, including mortgage-debts.

3. That the estate for life devised to the appellant does not form part of the fund, and is not subject to the charge.

4. That the real and personal estate, the proceeds of which form the fund, are liable to contribute ratably to the burden of the charge.

5. And that the costs of the motion and of the appeal be paid out of the mixed fund.

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[APPELLATE DIVISION.]

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DAVIS v. TOWNSHIP OF USBORNE.

Highway—Nonrepair—Injury to Traveller—Open and Unguarded Ditch at Side of Travelled Road—Horse Shying at Motor Vehicle and Overturning Buggy and Occupant into Ditch—Duty of Township Corporation—Municipal Act, R.S.O. 1914, ch. 192, sec. 460—Reasonable Safety for Public Travel—Additional Danger from Motor Vehicles—Failure to Perform Duty—Cause of Injury.

The plaintiff, driving in a buggy drawn by a horse, upon a township road, was injured by reason of the horse taking fright at a motor vehicle coming in the opposite direction, shying, and overturning the plaintiff and the buggy into a ditch at the side of the road. The road was a leading one and much travelled; there were open ditches on each side of it; the depth of the easterly one at its lowest point was four feet seven inches; the space between this ditch and the travelled part of the road was about eighteen inches; the width of the road between the ditches was twenty-four feet; and the ditch into which the plaintiff fell was not guarded by a railing. In an action to recover damages for the plaintiff's injuries, it was not suggested that the accident was caused or contributed to by any negligence on the part of the plaintiff, or that the motor vehicle was not lawfully upon the road:—

Held, that the proper conclusion upon the evidence was, that the defendants (the township corporation) had failed to perform the duty imposed upon them by sec. 460 of the Municipal Act, R.S.O. 1914, ch. 192, of keeping the road in repair, and that the plaintiff's injuries were sustained by reason of that default.

The statutory duty imposed upon the defendants required them to make the road reasonably safe for the purposes of travel, and so safe from any additional danger incident to the use of it by motor vehicles.

Review of the authorities.

Judgment of the Senior Judge of the County Court of the County of Huron reversed.

AN appeal by the plaintiff from the judgment of the Senior Judge of the County Court of the County of Huron, after trial of the action in the County Court without a jury, dismissing it with costs.

The action was brought to recover damages for injuries alleged to have been sustained by the plaintiff by reason of the non-repair of a road under the jurisdiction of the defendants, the Municipal Corporation of the Township of Usborne; the plaintiff's horse took fright at a motor vehicle, shied, and overturned the plaintiff and the buggy in which she was travelling into a ditch at the side of the road.

February 9. The appeal was heard by MEREDITH, C.J.O., GARROW, MACLAREN, MAGEE, and HODGINS, JJ.A.

R. S. Robertson, for the appellant, referred to *Connor v.*

Township of Brant (1914), 31 O.L.R. 274; *Ackersviller v. County of Perth* (1914), 32 O.L.R. 423, 430; *Attorney-General v. Sharpness New Docks etc. Co.*, [1914] 3 K.B. 1, 20; *Sharpness New Docks etc. Co. v. Attorney-General*, [1915] A.C. 654; *Attorney-General v. Great Northern R.W. Co.* (1914), 83 L.J. Ch. 763; *Walton v. County of York* (1881), 6 A.R. 181.

F. W. Gladman, for the defendants, respondents, argued that the judgment of the learned trial Judge was supported by the law and the facts of the case. The road was built nearly sixty years ago, and had always been considered a good road.

Robertson, in reply.

February 21. The judgment of the Court was delivered by MEREDITH, C.J.O.:—This is an appeal by the plaintiff from the judgment of the County Court of the County of Huron, dated the 8th December, 1915, which was pronounced by the Senior Judge of that Court, after the trial of the action before him, sitting without a jury, on the previous 20th October.

The action is brought to recover damages for injuries sustained by the appellant owing, as she alleges, to the default of the respondents in the performance of the duty imposed upon them by sec. 460 of the Municipal Act, of keeping in repair the roads under their jurisdiction.

The injuries were met with while the appellant was being driven by her son, after nightfall, in a covered buggy drawn by a single horse, on a leading road known as the London road, and were caused by the horse taking fright at a motor vehicle coming in the opposite direction, and having shied and overturned the appellant and the buggy into a ditch on the east side of the road.

The London road, is, as I have said, a leading road, and is much travelled. There are open ditches on each side of it. The depth of the easterly one at its lowest point is four feet seven inches, which is the extent of the fall from the shoulder of the road in a distance of five and a half feet. The space between the ditch and the travelled part of the road is only about eighteen inches, and the width of the road between the ditches, or, as the witness Farncombe spoke of it, between "shoulder" and "shoulder," is twenty-four feet. I take these figures from the plan and Mr. Farncombe's evidence explaining it. The plan also shews

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that the part of the travelled way east of the crown of the road is practically level, while that west of the crown slopes from it to the ditch, and has a fall of two feet two inches in a distance of less than thirteen feet.

It is not suggested that the accident was caused or contributed to by any negligence on the part of the appellant or of her son, or that the motor vehicle was not lawfully upon the road.

The learned Judge of the County Court, as I understand his reasons for judgment, was of opinion that the road was reasonably safe for the purposes of public travel by the means in use before the advent of motor vehicles, and that the respondents, having provided such a road, were under no obligation to improve it so as to make it reasonably safe against the added danger which was or might be occasioned by its being used by motor vehicles.

This reasoning, in my opinion, implies that the road was not reasonably safe for public travel under existing conditions—that is, now that it is made use of by motor vehicles, and that that was the view of the learned Judge is apparent, I think, from his reasons for judgment and his observations during the course of the trial.

I confess that I do not understand how it properly can be said that the road was reasonably safe for the purposes of public travel by the means in use before the advent of motor vehicles. An accident such as that which happened to the appellant might just as well have happened by her horse having taken fright at an approaching waggon or some other object on or near the road, and having shied, and if the ditch was likely to prove dangerous if a horse should shy, the cause of the shying, whether due to fright caused by an approaching motor vehicle or by an approaching waggon or by some other object on or near the road, is immaterial. The question is, was the road reasonably safe for public travel? And in considering that question account must be taken of the fact that horses do shy, and a road is not, in my opinion, reasonably safe for public travel where there is close to the travelled way a ditch four feet seven inches deep, with but little slope to its sides, into which, in the case of a horse shying, there would be danger of a horse and vehicle being overturned, and a like danger to persons using the road at night if they should happen to drive into or too close to the ditch.

It is said that a ditch was necessary for draining the road, but the proper conclusion upon the evidence is, that so deep a ditch was not necessary, and that there was no reason why a shallower one should not have been made or why the sides of it should not have been made more sloping. But, if such a ditch as exists was necessary, it should have been guarded by a railing. An open ditch, however, was unnecessary. The water it was designed to carry off might have been carried away by an underground tile drain, which would not have been a source of danger to travellers.

I am unable to agree with the view of the learned Judge that the respondents' duty was fulfilled if they had provided a road reasonably safe for the purpose of travel upon it before the advent of motor vehicles. It may be that it would have been unreasonable to require a corporation at once after motor vehicles came into use to make their roads, otherwise sufficient, safe for travel under the changed conditions; but that is not this case. Motor vehicles have been in use for several years, and are a common means of transportation in general use throughout the Province, as well as elsewhere; and, in my opinion, the statutory duty imposed upon the respondents required them to make the road in question reasonably safe for the purposes of travel, and so safe from any additional danger incident to the use of it by motor vehicles.

The nature and extent of the obligation imposed upon municipal corporations of keeping in repair the highways under their jurisdiction has been stated in varying language in numerous reported cases.

In the early case of *Colbeck v. Township of Brantford* (1861), 21 U.C.R. 276, 278, 279, Robinson, C.J., said: "If, for instance, an accident should arise on a new side line or concession line lately opened in a township but thinly settled, the argument would be probably urged that what should be understood by the words 'keeping in repair' should be construed with a reasonable attention to circumstances, for such a road could hardly be expected to be found in as perfect condition as an old highway in a well-settled township."

In *Toms v. Township of Whitby* (1874), 35 U.C.R. 195, 223, it is said that "the road or bridge must be reasonably safe for the public use, and if it be not so, the fact that the horse was running

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away or unmanageable will not prevent the person injured from recovering for the damage he has sustained."

In *Castor v. Township of Uxbridge* (1876), 39 U.C.R. 113, 122, it was said by Harrison, C.J.: "When a highway is in such a state from any cause, whether of nature or man, that it cannot be safely or conveniently used, it may in a large and liberal sense be said to be out of repair."

In *Foley v. Township of East Flamborough* (1898), 29 O.R. 139, 141, Armour, C.J., said: "The word 'repair,' as used in the Municipal Act, has been held to be a relative term; and to determine whether a particular road is or is not in repair, within the meaning of the Act, regard must be had to the locality in which the road is situated, whether in a city, town, village, or township, and if in the latter, to the situation of the road therein, whether required to be used by many or by few, to how long the township has been settled, to how long the particular road has been opened for travel, to the number of roads to be kept in repair by the township, to the means at its disposal for that purpose, and to the requirement of the public using the road . . . And I think that if the particular road is kept in such a reasonable state of repair that those requiring to use the road may, using ordinary care, pass to and fro upon it in safety, the requirement of the law is satisfied."

In *City of Kingston v. Drennan* (1897), 27 S.C.R. 46, 55, Sedgewick, J., used the following language: "The obligation of the city was to keep the streets and sidewalks in a reasonable state of repair—in such a condition that the traveller using them with ordinary care might do so with safety."

In *Walton v. County of York*, 6 A.R. 181, the Court of Common Pleas (1879), 30 C.P. 217, had held that the having a ditch without guards or railings, or without slanting the roadway to the bottom of the ditch so that a person could drive into it without upsetting, was no evidence of neglect on the defendants' part to keep the road in repair, and had granted a nonsuit; but on appeal to the Court of Appeal that ruling was reversed, and it was held that it was a question of fact for the jury whether, having regard to all the circumstances, the road was in a state reasonably safe and fit for ordinary travel. In delivering the judgment of the Court of Common Pleas, Wilson, C.J., said (p. 223): "I will

not say that no country ditch is to be fenced off or guarded. This county has made a rule to fence off all ditches of four feet depth or more. I do not say whether that is the proper rule in such cases or not. It is only necessary I should give an opinion upon the ditch which is now in question, at the side of the road, as that road has been described."

Applying the test which, according to these cases, is to be applied, I am of opinion that the proper conclusion is, that the respondents failed to perform their statutory duty of keeping in repair the road in question, and that the injuries of which the appellant complains were sustained by reason of that default; and I would, therefore, allow the appeal with costs, reverse the judgment of the Court below, and substitute for it a judgment for the appellant for \$150 with costs.

If my view of the respondents' duty imposes too onerous a burden on municipal corporations, relief can be had only from the Legislature, which has already imposed restrictions upon the use of highways by traction engines and by motor vehicles.

Appeal allowed.

[APPELLATE DIVISION.]

STERLING LUMBER CO. v. JONES.

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Mechanics' Liens—Claim against Purchaser of Unfinished Building—Absence of Actual Notice—Knowledge of Building Operations—Priority of Registration—Registry Act—"Owner"—Mechanics and Wage-Earners Lien Act, R.S.O. 1914, ch. 140, secs. 2(c), 21.

Under the Mechanics and Wage-Earners Lien Act, R.S.O. 1914, ch. 140, priority of registration, in the absence of actual notice, must prevail. Section 21 of the Act considered.

Cook v. Koldoffsky (1916), 35 O.L.R. 555, and *Marshall Brick Co. v. Irving* (1916), 33 O.L.R. 542, followed.

Knowledge that building is going on upon the land does not constitute actual notice.

Richards v. Chamberlain (1878), 25 Gr. 402, followed.

O. purchased from the building owner land with an unfinished house upon it, to be taken over "as soon as house is completed." This was done, the deed registered and the money paid, about two weeks before the plaintiffs' and other liens were recorded in respect of work done for and materials furnished to the building owner. O. had no actual notice of any liens or claims for liens:—

Held, that he was entitled to priority by virtue of the Registry Act; and that he did not come within that part of the definition of an owner (sec. 2 (c)) which depends upon privity, consent, or benefit, coupled with request, so as to render the land subject to the liens.

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Gearing v. Robinson (1900), 27 A.R. 364, followed; and *Slattery v. Lillis* (1905), 10 O.L.R. 697, 703, approved and followed.
Judgment of an Official Referee affirmed.

APPEAL by the plaintiffs from the judgment of R. S. Neville, Esquire, K.C., an Official Referee, upon the trial of an action to enforce a mechanics' lien.

Reasons for judgment of the learned Referee, in which the facts are stated, were given as follows:—

This is an action brought by the plaintiffs to enforce a mechanics' lien for the sum of \$243.31 against the lands mentioned in the statement of claim. At the trial, the Monarch Brass Manufacturing Company Limited appeared with a claim for \$190.96, one Rodaro with another for \$145.65, and the Vokes Hardware Company with a further claim for \$124.23.

The claims were all established in the usual way, and judgment will go for each of the claimants for their respective claims against the defendant Jones; the plaintiffs would be entitled also to liens upon the lands, but for the fact that the lands were sold by the defendant Jones to the late James Oliver, before any liens were registered.

The real contest between the parties is as to whether Oliver's purchase from Jones has freed the property from the liens. The facts were diligently inquired into by counsel at the trial, and afterwards the case was argued at considerable length, all counsel citing authorities.

The facts may be briefly set out. The defendant Jones was the owner, and he employed the various lien-holders in the construction of his house, or bought material from them. All the claims rest upon contracts or orders given by Jones. As the house was approaching completion, one Coates, who was finishing the painting work, interested himself to sell the property, and he brought Jones and Oliver together, and they made a contract by which Oliver agreed to purchase the property.

At this time, or immediately after, Oliver was ill and was unable to go about, but he placed the matter in his regular solicitor's hands for the purpose of carrying out the purchase. Mr. Oliver knew that the building was only just being completed; and in fact, when the contract was signed, there were still some little things to do to make the construction complete. Mr. Oliver,

being confined to his house, left the matter entirely in his solicitor's hands, except for the one incident, namely, that he told his solicitor that Coates would report to him when the house was complete. He told Mr. Mitchell, his solicitor, that when Coates reported that the house was complete that would be satisfactory, and that is all that he ever employed Coates to do, so far as carrying through the purchase is concerned. Mitchell knew that the house was being completed, and he knew that contractors, material-men and labourers, if not paid, would be entitled to liens, and in carrying through the sale he had this in mind all the time. There were no liens registered, however; and Mr. Mitchell endeavoured to see that all claims were paid. Mr. J. A. Campbell, another solicitor, was acting for the mortgagee of the property, and was said to be familiar with the progress of the work. Mr. Mitchell handed to Mr. Campbell \$500 for the purpose of paying off any claims there might be on the part of possible lien-holders, and I understand that the money was paid out to settle claims just as it was intended that it should be. Then it was represented to Mr. Mitchell that all claims were paid, and that there were no liens or possible liens that might be registered. Mr. Mitchell on the 3rd July, 1914, took a statutory declaration from the defendant Jones, which stated that he (Jones) was a builder and owner of the premises in question, that the said premises were complete except the varnishing and painting of verandah floors, and he added that that work was being completed on the day he made the declaration. The declaration also said that all work and material were paid for, and that there were no liens and no one entitled to file a lien. The man Coates, before mentioned, is the one whose work it was said was being completed on the day the statutory declaration was made, and his was one of the claims paid off. I think, however, it was paid not out of the \$500 above mentioned, but out of an item of \$200 which Oliver had paid over as a deposit when the contract of sale was entered into. Mr. Mitchell knew that Coates was paid; and then, if the statutory declaration could be relied on, it was clear that there were no possible claims against the property.

Mr. Mitchell registered the conveyance to Oliver on the 9th July, 1914, and at the time he did so he believed that all claims had been paid upon which liens might be claimed or founded,

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and he believed the statements made in Jones's statutory declaration, and acted upon this belief. No liens were registered till the following month.

It is clear that Mr. Oliver himself knew of no liens. It is also clear that Mr. Mitchell knew of no liens, and did not think there were any. Coates swears that he did not know of any other liens or claims except his own, and thought everything was paid for. I mention this because it was argued that Coates was Oliver's agent, and that his knowledge affected Oliver. I do not think that he was Oliver's agent in any respect except as I have mentioned before.

The conclusion that I have come to is, that Oliver was an innocent and *bonâ fide* purchaser for value of the lands in question without having either knowledge or notice of any liens then existing, and that he paid over his purchase-money and took his conveyance and registered it, through his solicitor, in the full belief that there were no liens against the property, his solicitor having the same belief and acting in the manner I have already set forth. I think that Oliver is entitled to hold the property freed of all liens, and that his executors, who are defendants, must succeed in this action.

The plaintiffs' appeal was on the following grounds:—

(1) That the judgment was contrary to law and the weight of evidence.

(2) That the Referee should have found that the plaintiffs were entitled to a lien upon the lands in question, having fulfilled all the requirements of the statute in that behalf to entitle them to such lien, in respect of the materials furnished; and that the plaintiffs' said lien could not be destroyed by a sale or conveyance of the said lands.

(3) That the said James Oliver was fixed with notice of the existence of the said lien and must be held to have taken subject thereto.

(4) That the learned Referee erred in holding that the plaintiffs were not entitled to a lien against the interest of the said James Oliver, when they had registered, within the thirty days immediately following the last delivery of materials, their lien in respect of the same.

(5) That the said James Oliver could not relieve himself from

liability by accepting a declaration, as to the absence of liens, made by the defendant Jones.

February 11. The appeal was heard by MEREDITH, C.J.O., GARROW, MACLAREN, MAGEE, and HODGINS, JJ.A.

D. Inglis Grant, for the appellants, referred to *Bickerton & Co. v. Dakin* (1891), 20 O.R. 695; *McVean v. Tiffin* (1885), 13 A. R. 1; *Wanty v. Robins* (1888), 15 O.R. 474; *Cut-Rate Plate Glass Co. v. Solodinski* (1915), 34 O.L.R. 604; *Reggin v. Manes* (1892), 22 O.R. 443. The plaintiffs, as material-men, having a lien which had attached by the supplying of the materials and doing the work, rely on sec. 21 of the Act.

R. G. Agnew, for the defendants the owners, the respondents, argued that the owners having taken over the building, paid their money, and registered their deed before the liens were recorded, and having no actual notice of the liens, were protected under the Act.

Grant, in reply.

February 21. The judgment of the Court was delivered by HODGINS, J.A.:—The Official Referee finds that neither the purchaser, Oliver, nor his solicitor, nor his so-called agent, Coates, had any actual notice of any liens or claims for liens when the purchase by Oliver was completed. This opinion is justified by the evidence, which satisfies me that every reasonable and proper precaution was taken to avoid, if diligence could accomplish it, the very position in which the appellants seek now to put the buyer's personal representatives.

The purchase by Oliver was of an unfinished building to be taken over by him from Jones, the building owner, "as soon as house is completed to inspector's satisfaction." This was done, the deed registered and the money paid, about two weeks before the liens were recorded. Counsel for the appellants did not dispute the good faith of Oliver, nor of his solicitor, but relied on the provisions of the statute as preserving the priority of their lien, and those of the other lien-holders, over the deed. The ground urged was that, the lien having attached by the doing of the work and the supplying of materials, the language of sec. 21 of the Mechanics and Wage-Earners Lien Act, R.S.O. 1914, ch. 140, "Except as

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herein otherwise provided those Acts" (i.e., the Registry Act and the Land Titles Act) "shall not apply to any lien arising under this Act," took the lien out of the provisions of those Acts so far as they enacted that registration was necessary to preserve priority.

This view is not new, but the current of authority has steadily set against it, and, in addition to the cases referred to on the argument, I may mention *In re Craig* (1883), 3 C.L.T. 501, a decision of Proudfoot, J., contrary to his dissenting view in *Hynes v. Smith* (1879), 27 Gr. 150, and *McNamara v. Kirkland* (1891), 18 A.R. 270, where the meaning of the exception is specially discussed. Recently the decisions in the Appellate Division have adhered to the view that priority of registration, in the absence of actual notice, must prevail. See *Cook v. Koldoffsky* (1916), 35 O.L.R. 555, and *Marshall Brick Co. v. Irving* (1916), 35 O.L.R. 542.

There is not in this case any actual notice of the liens brought home. Knowledge that building is going on upon the lands is not enough. This is established by decisions beginning in 1878: *Richards v. Chamberlain* (1878), 25 Gr. 402. Nor can it be successfully contended that Oliver comes within that part of the definition of an owner which depends upon privity, consent, or benefit, so as to render the land in the hands of his representatives subject to the liens.

The cases of *Gearing v. Robinson* (1900), 27 A.R. 364, and *Slattery v. Lillis* (1905), 10 O.L.R. 697, have definitely determined that, in the language of the present Chief Justice of Ontario (10 O.L.R. at p. 703) "there must be the request, the furnishing of the materials in pursuance of that request either upon the owner's credit or on his behalf or with his privity or consent or for his direct benefit. If, in addition to the request, one or other of these alternative conditions exist . . . the lien is created in favour of the material-man."

This has been in effect followed in *Cut-Rate Plate Glass Co. v. Solodinski*, 34 O.L.R. 604, *Orr v. Robertson* (1915), *ib.* 147, and in the case of *Marshall Brick Co. v. Irving*, already referred to. It is quite possible to give a reasonable interpretation to the words in the definition (sec. 2 (c)) "all persons claiming under him or them whose rights are acquired after the work or service in respect of which the lien is claimed is commenced or the materials

furnished have been commenced to be furnished," without infringing this principle. See *Reggin v. Manes*, 22 O.R. 443, and *Blight v. Ray* (1893), 23 O.R. 415. But, if Oliver comes within this definition by virtue of his deed from Jones, as he seems to do, his protection is found, as already indicated, in the Registry Act.

The appeal should be dismissed with costs.

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Appeal dismissed.

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Liquor License Act—Magistrate's Conviction of Unlicensed Person for Keeping Intoxicating Liquor for Sale—Proof of Intoxicating Nature of Liquor—Certificate of Government Analyst—Production by Chief of Police of City—"Inspector or any Officer of the Crown"—R.S.O. 1914, ch. 215, secs. 106, 126, 128, 129.

The Chief of Police for a city, employed and paid by the city corporation, and not shewn to have any authority from the Crown, is not an "officer of the Crown," within the meaning of sec. 106 of the Liquor License Act, R.S.O. 1914, ch. 215. And a magistrate's conviction of a person accused of keeping intoxicating liquors for sale, contrary to the Act, based upon a certificate of the Government analyst, procured and produced by the Chief of Police for a city, shewing that liquor found upon the premises of the accused contained more than 2½ per cent. of proof spirits, was quashed—not being sustainable without a certificate produced by "the Inspector or any officer of the Crown."

Sections 126, 128, and 129 of the Act considered.

The earlier part of sec. 129 cannot be so construed as to make of a policeman or constable an officer of the Crown with the powers conferred on such an officer by sec. 106.

MOTION to quash the conviction of the defendant by the Deputy Police Magistrate for the City of Stratford for having, on the 19th December, 1915, kept intoxicating liquors for sale, without a license therefor, in violation of the Liquor License Act, R.S.O. 1914, ch. 215.

January 25. The motion was heard by KELLY, J., in Chambers.

F. R. Blewett, K.C., for the defendant.

J. R. Cartwright, K.C., for the Crown.

February 21. KELLY, J.:—On the 7th January, 1916, Jerry Hurley was convicted by the Deputy Police Magistrate for the City of Stratford of having, on the 19th December, 1915, kept

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intoxicating liquors for sale, without a license therefor. The present motion is to quash the conviction.

Hurley was the keeper of a restaurant in the city of Stratford; and, on the evening of the 19th December, the Chief of Police for the city and one of his officers entered the premises, and, finding two men in a room in the act of drinking the contents of two bottles which were purchased from the accused, seized the bottle in the possession of one of the men, Mallion, from which only a portion of the contents had been taken. Other bottles were also seized; but in his written reasons for his decision the magistrate confined his conclusions to the contents of the bottle taken from the possession of Mallion. The evidence of the Chief of Police is that he sent the Mallion bottle to the Government analyst at Toronto on the 21st December, and on the 23rd received the analyst's certificate, which was produced at the hearing, that the contents contained $71\frac{31}{100}$ per cent. of proof spirit.

By the Liquor License Act, R.S.O. 1914, ch. 215, sec. 2 (*i*), any liquor which contains more than $2\frac{1}{2}$ per cent. of proof spirits shall be conclusively deemed to be intoxicating.

The magistrate based the conviction on the evidence contained in the analyst's certificate; he says that, apart from that evidence, he would not have found the accused guilty. That, though the only finding against the accused, would be sufficient to sustain the conviction if the certificate was admissible in evidence.

Section 106 of the Liquor License Act provides: "In any prosecution under this Act the production by the Inspector or any officer of the Crown of a certificate signed or purporting to be signed by the Government analyst as to the analysis of any liquor and of an affidavit attesting the signature of such analyst, shall be conclusive evidence of the facts stated in such certificate."

One ground of attack on the validity of the conviction is in respect of the meaning of the words "Inspector or any officer of the Crown" in that section. Other grounds are also urged. "Inspector," when used in the Act, means an Inspector of Licenses appointed for a License District under the Act (sec. 2 (*d*)). In this instance it was the Chief of Police for the city who not only produced, but also procured, the analyst's certificate, and this, as far as the evidence shews, without the instructions, request or

assistance of any other person, except the assistance of his subordinate in making the seizure and transmitting the bottles to the analyst. Admittedly he is not "the Inspector," and no claim can be or is made that he acted in that capacity.

But the position taken by the prosecution is that he comes within the designation of "officer of the Crown" as used in sec. 106. On this the whole case turns. He is not employed by or on behalf of the Crown (Municipal Act, R.S.O. 1914, ch. 192, sec. 360); remuneration for his services is not paid by or out of moneys of the Crown (secs. 363 and 368). So far as these indicate, he is an officer appointed by the city—the city's employee or servant. There is nothing before me to the contrary.

But sec. 129 of the Liquor License Act is appealed to as authority to support the Crown's contention that he is an officer of the Crown, within the meaning of sec. 106.

Section 126 of the Act authorises the appointment by the Lieutenant-Governor of one or more Provincial officers whose duty it shall be to enforce the provisions of the Act, and especially those for the prevention of traffic in liquor on unlicensed premises, and declares that any of these officers may be designated "Provincial Inspector;" that section also sets forth their duties and powers.

Section 128 empowers the Board (of License Commissioners appointed for any License District under the Act), with the sanction of the Lieutenant-Governor in Council, to appoint one or more officers to enforce the provisions of the Act, and especially those for the prevention of traffic in liquor by unlicensed houses, and declares that every such officer shall, within the License District for which he is appointed, possess and discharge all the powers and duties of Provincial officers appointed under sec. 126 other than those of the Provincial Inspectors.

The early part of sec. 129 is: "Every officer so appointed under this Act and every policeman or constable, or Inspector, shall be deemed to be within the provisions of this Act;" and to this the prosecution points as an expression by the Legislature of an intention to clothe all these persons with the right and authority to proceed under sec. 106, and produce, as conclusive evidence, a certificate such as that on which only the present conviction can be sustained. Though it is by no means easy to determine what

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the Legislature intended to convey by the language of doubtful meaning used in this part of sec. 129, I am far from believing that it was the object to bring within the class "officer of the Crown," and clothe with the important powers conferred upon an Inspector or officer of the Crown by sec. 106, that numerous class of persons, scattered throughout the Province, answering to the name of policeman or constable, or that so important a part in the administration of an exacting law as laying the foundation for and procuring a piece of conclusive evidence not based on oath or affirmation should be entrusted to any one or other of that numerous class. If the framers of that legislation had in mind such procedure, they were unfortunate in their manner of expressing themselves.

But, when the remaining part of sec. 129 is examined, it speaks rather against the construction put upon the earlier part by the prosecution. Following immediately after the part of the section above quoted, and separated from it by a semicolon, is this: "and where any information is given to any such officer, policeman, constable, or Inspector that there is cause to suspect that some person is contravening any of the provisions of this Act, it shall be his duty to make diligent inquiry into the truth of such information, and to enter complaint of such contravention before the proper Court, without communicating the name of the person giving such information;" etc. This certainly does not assist the prosecution. Rather does it define—if indeed it does not limit—the duties of the officer, policeman, constable, or Inspector of making inquiry and entering complaint where information is given that there is cause to suspect a contravention of the provisions of the Act. But, of itself, this does not constitute the persons named officers of the Crown; and I know of no other reason for so considering them.

It is significant, too, that the Legislature has been careful, in just such cases as the present, to provide for the appointment for certain specific purposes of persons as Provincial officers (sec. 126), and for giving persons appointed by the Board of License Commissioners, with the sanction of the Lieutenant-Governor in Council, the powers and duties of Provincial officers (sec. 128). But such powers are not expressly conferred upon one holding only the position of Chief of Police, policeman, or constable; and the

Chief of Police in this instance holds no such appointment and has had no such powers conferred upon him.

I have not attempted to interpret fully the meaning of the earlier part of sec. 129, but I have no hesitation in saying that it cannot be so construed as to make of a policeman or constable an officer of the Crown with the powers conferred on such an officer by sec. 106.

The conviction cannot be sustained, and must be quashed; but, under the circumstances, without costs; and there will be an order of protection to the magistrate.

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Mortgage—Funds Derived from Fire Insurance and from Sale of Mortgaged Premises—Application of Insurance Moneys—Mortgages Act, R.S.O. 1914, ch. 112, sec. 6 (2)—“Marshalling”—Execution Creditors—Second Mortgage—Priorities—Master’s Report—Appeal.

“Marshalling” properly arises where a creditor, who has two funds, chooses to resort to the only fund upon which other creditors can go, in which case they are to stand in his place for so much against the fund to which they otherwise could not have access.

Where a Local Master, upon a reference in a mortgage action, treated the moneys derived from the mortgaged premises as two funds because part came from insurance upon buildings on the premises destroyed by fire, and part from the sale of the mortgaged premises after the fire, and dealt with the proceeds of the insurance by process of marshalling between prior and subsequent mortgagees, thus impairing the rights of execution creditors intermediate between the mortgagees, his report was, upon appeal by the execution creditors, corrected.

The insurance policy insured the mortgagor against loss by fire, and contained a clause by which the loss was made payable in the first instance to the first mortgagees (the plaintiffs) and in the second instance to the defendant W. (a subsequent mortgagee), “as their interests may appear.” The premiums were paid by the plaintiffs and charged to the mortgagor. The amount of the insurance was not sufficient to satisfy the claim of the plaintiffs:—

Held, that the plaintiffs had the right to apply all the insurance money to satisfy their own mortgage: Mortgages Act, R.S.O. 1914, ch. 112, sec. 6 (2); and, that application being made, the first mortgage was reduced for the benefit of the execution creditors; and the defendant W. had no right to complain.

Edmonds v. Hamilton Provident and Loan Society (1891), 18 A.R. 347, specially referred to.

APPEAL by the defendants the Cornwall Beef Company and Donald Ciotti, execution creditors of the defendants Genitti, the mortgagors, and made parties in the Master’s office as subsequent

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incumbrancers, in a mortgage action, from the report of the Local Master at Sault Ste. Marie, upon the grounds following:—

(1) Because the Master had found by para. 6 of the report that the defendant Elizabeth S. Wilcox was entitled to rank upon the insurance moneys (referred to in para. 5) next after the claim of the plaintiffs, whereas the insurance moneys were paid by the Norwich Union Fire Insurance Society to and applied by the plaintiffs on account of their mortgage on the 23rd December, 1915, as appeared from the affidavit of Walter J. Helm, assistant manager of the plaintiffs, filed in the Master's office, and the said Master had no power to set aside or interfere with the plaintiffs' application of the said insurance moneys.

(2) Because the Master, by para. 8 of his report, had found that, at the date of the report, there was due to the plaintiffs for principal money, interest, and costs the sums following, namely:—

Balance of principal money etc.	\$1,931.38
Costs of action taxed at	41.35
Costs and disbursements in Master's office taxed at	287.76

Total.....\$2,160.49

Whereas the Master should have found, in accordance with the affidavit of the said Walter J. Helm, filed in the Master's office, that at the date of the report there were due the sums following, viz.:—

Balance of principal	\$329.68
Interest to the 17th January, 1916	10.60
Costs of action	41.35
Costs in Master's office	287.76

Total.....\$669.39

(3) Because the Master, by para. 10 of his report, had settled the priorities between all the parties to this action who had proved their claims, in accordance with the order, in the terms of schedule A. thereto, instead of in accordance with the respective priorities in the order as set out in para. 8 thereof, and in the Master's certificate (or report) dated the 24th September, 1915.

(4) Because the Master, by para. 10 of the report, found that

the moneys in Court (i.e., the purchase-money to the amount of \$1,500 paid into Court as set out in para. 3 of the report) should be paid out to the various parties as set forth in schedule B. thereto, whereby the sum of \$138.67 was directed to be paid out of said purchase-money in Court to the defendant Elizabeth S. Wilcox, notwithstanding that, by para. 6 of the report, the Master had found and reported that the execution creditors the Cornwall Beef Company and Donald Ciotti were entitled to rank upon the said purchase-money next after the claim of the plaintiffs; and, although, in para. 6 of his report, the Master, by invoking the doctrine of "marshalling," ranked the claim of the defendant Wilcox in priority to the execution creditors upon the insurance moneys, the Master had given effect to the plaintiffs' application of the insurance money in the order for payment out of Court by schedule B. under para. 10 of his report, as follows: "To the plaintiffs, balance of their claim as shewn in report, \$2,160.49, less amount of insurance money retained by them, \$1,491.10 = \$669.39," and there was not a sufficient fund in Court, after payment of the claims of the prior incumbrancers, according to their respective priorities in their order as set out in para. 8 of the report, to leave any sum whatever for the defendant Wilcox, and schedule B. should be corrected and amended accordingly.

(5) Because the amount of damage done to the building and allowed to the purchaser under para. 7 of the report, *viz.*, the sum of \$38, had been paid to the plaintiffs, and the amount to be paid to the plaintiffs, as set out in schedule B. to the report, should be reduced by the sum of \$38, and the said sum should be added to the amount to be paid to the appellant execution creditors, and apportioned between them, and the report should be amended accordingly.

(6) Because the said Master by his report, notwithstanding the plaintiffs' appropriation of the insurance moneys, deals with the purchase-money paid into Court, as set out in para. 3 thereof, and the insurance money paid to the plaintiffs, as set out in schedule B. thereto, as two separate funds, whereas the total of the respective sums should be treated as one fund, being the proceeds of the property of the mortgagor, and distributable according to the priorities of the several incumbrancers, as found by the Master's certificate (or report) of the 24th September, 1915, and in the order as set out in para. 8 of the report.

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(7) Because the Master, by schedule A. (part II.) of his report, set out the insurance money "as received and retained by the plaintiffs," and thereby dealt with and exercised jurisdiction over the same, whereas the said insurance money had been already appropriated by the plaintiffs on their claim under their mortgage, as proven by the affidavit of the plaintiffs' manager, filed in the Master's office, from which affidavit the Master ascertained and fixed the amount to be paid to the plaintiffs out of the purchase-money in Court, as set out in schedule B. to his report, and the Master had no power so to deal with the said insurance money, and all that part of the report so dealing therewith should be amended accordingly.

(8) In the absence of any appropriation of the said insurance money by the plaintiffs the Master had no power to invoke the doctrine of "marshalling" in favour of the defendant Wilcox (5th incumbrancer) in priority to and to the prejudice of the execution creditors (4th incumbrancers), as the insurance moneys, if treated as a separate fund, must stand in the place of the mortgaged premises, and the insurance moneys, when received, until so appropriated by the plaintiffs on the mortgage, "are a security in the same sense, and to the same extent exactly, as the land, and are redeemable in the same terms" (see judgment of MacLennan, J.A., in *Edmonds v. Hamilton Provident and Loan Society* (1891), 18 A.R. 347, at p. 367), and therefore subject to the priorities as found by the Master in para. 6 of his report, in respect of the purchase-money.

(9) Because the appropriation of the said insurance money by the plaintiffs on the day of receipt thereof, as proven by affidavit filed in the Master's office, was final, and the plaintiffs had a right so to apply the said insurance money in reduction of the mortgage-debt herein; and hence there remained only the purchase-money in Court to be distributed under the Master's report, and the Master had exceeded his jurisdiction by attempting to ignore, or recall, or otherwise apply the same, under any doctrine of "marshalling" to the prejudice of the established priorities herein.

February 14. The appeal was heard by BOYD, C., in the Weekly Court at Toronto.

A. W. Langmuir, for the appellants.

G. S. Hodgson, for the plaintiffs.

No one appeared for the defendant Wilcox, who was served with notice of the appeal.

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February 21. *BOYD, C.*:—The doctrine of marshalling has been misapplied by the Master in dealing with the administration of money in this case.

“Marshalling” properly arises (as tersely put by *Romilly arguendo*). “where a creditor, who has two funds, chooses to resort to the only fund upon which other creditors can go, they shall stand in his place for so much against the fund, to which they otherwise could not have access:” *Aldrich v. Cooper* (1803), 8 Ves. 382, 383.

The Master has treated the moneys derived from mortgaged premises as two funds because part comes from insurance moneys upon the buildings destroyed by fire, and part is from sale of the mortgaged premises after the fire. He has dealt with the proceeds of the insurance by process of marshalling between prior and subsequent mortgagees, and has thus impaired the rights of execution creditors intermediate between the mortgagees. To explain, it is necessary to summarise the important facts and dates.

The plaintiffs’ mortgage is on a lot with buildings in Sault Ste. Marie, and was made on the 11th July, 1912, and is the first incumbrance. It contained a covenant that the mortgagor should insure for the mortgagees’ benefit. This mortgage was about \$2,000. On the 27th January, 1914, an execution was registered against the land by the Cornwall Beef Company for over \$300, and another writ against land by Ciotti on the 15th May, 1914, for less than \$100.

The second mortgage was to Elizabeth S. Wilcox for \$225 on the 8th July, 1914. [This also had a covenant by mortgagor to insure.]

The plaintiffs’ writ to realise on their security issued on the 19th May, 1915, and judgment to take accounts on the 23rd July, 1915, under which the above subsequent incumbrancers were brought in and made parties.

On the 24th February, 1915, there had been a partial fire on

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the premises and a loss of \$415, of which \$176 was expended in repairs, and the balance, \$238, was received by the first mortgagees and applied on the mortgage as of date the 26th March, 1915. This fact is not material except as reducing the mortgage account.

On the 31st October, 1915, there was a second fire, and the amount of the loss was fixed at \$1,491, which was paid over by the insurance company on the 23rd December, 1915.

The lands were offered for sale by public auction on the 15th November, 1915, but this proved abortive (no bid reaching the bid reserved), and they were afterwards sold by private tender to Marinelli, a third mortgagee, for \$1,500, which was paid into Court in January, 1916.

The Master states (in his reasons) that the portion of the buildings destroyed by fire was covered by an insurance policy in which the loss was made payable to the plaintiffs and the defendant Wilcox. The insurance company issued its cheque payable to the plaintiffs and this defendant. The said defendant endorsed the cheque and returned it to the plaintiffs, accompanied by a letter from her solicitor claiming to be entitled to share in the insurance money, under the covenant to insure in her mortgage, in priority to the execution creditors. The plaintiffs held the insurance money so received, "and proceeded with the sale of the property." As to this last sentence, the affidavit of Helm, the plaintiffs' manager, shews that the cheque for \$1,491 was received about the 23rd December, 1915, and was on that day applied on account of the company's mortgage.

The Midland Loan and Savings Company took out, under their mortgage, a policy for \$3,000, paid the premiums, and charged them to the mortgagor, before the existence of the Wilcox mortgage.

The policy existing at the date of the second fire was dated the 19th July, 1915, and insured the mortgagor against loss by fire to the extent of \$2,500 upon the buildings, and contained a co-insurance clause, by which the loss was made payable "in the first instance to the Midland Loan Company" (plaintiffs) "and in the second instance to Elizabeth S. Wilcox as their interests may appear." It was taken out in this form by the plaintiffs and the premiums paid by them and charged against the mortgagor.

The Master regards and has treated these as two funds issuing

from the mortgaged premises, i.e., the \$1,500 from sale moneys and \$1,491 from insurance moneys, and has apportioned the latter ratably between the two mortgagees. He says: "As to the purchase-money, admittedly the execution creditors are entitled to rank in priority to the defendant Wilcox . . . The execution creditors are not entitled to rank on the insurance moneys in priority to the defendant Wilcox. This, then, leaves the plaintiffs with two funds available for satisfaction of their mortgage: the purchase-money, in which the execution creditors are entitled to share next after the claim of the plaintiffs; and the insurance money, upon which the defendant Wilcox is entitled to rank. I am of opinion that the doctrine of marshalling comes into operation, and that the plaintiffs' claim should be assessed ratably over the two funds, and that the remainder go to the respective parties as above indicated."

It will simplify the consideration of the questions involved to know that the amount of the insurance was not sufficient to satisfy the claim of the first mortgagees. It is not needful to consider what, if any, claim the execution creditors might have on the insurance moneys if any balance had been left after satisfaction of the first mortgage. On the view of the situation as expounded in *Edmonds v. Hamilton Provident and Loan Society*, 18 A.R. 347, the insurance money, when received by the mortgagees, was a security in the same sense and to the same extent as the land, and therefore redeemable in the same terms by any one entitled to redeem, e.g., the execution creditors. So that it is by no means to be taken as of course that the execution creditors had no voice or interest in the application of the insurance. But this is an aspect of the case that does not now arise upon the facts.

The Master appears to have overlooked the effect of the contract as to these insurance moneys. They were not held as joint moneys or as ratably distributable, but to be payable firstly to the Midland company and secondly to Wilcox as their interests may appear. That is, according to the respective amounts due on the mortgages and according as their interests may appear—which would involve a consideration of priorities.

There are in truth not two funds to administer: one fund represented by the insurance money was at home in the hands of the plaintiffs before the other fund from the sale moneys arose.

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By the terms of the statute (the Mortgages Act), R.S.O. 1914, ch. 112, sec. 6 (2), the mortgagees had the right to apply all the insurance money to satisfy their own mortgage, which right they exercised on the 23rd December, 1915; and that concludes any other claim to dispose otherwise of the money. That reduces the first mortgage for the benefit, as is right, of the execution creditors, and affords no ground of complaint to the second mortgagee (see *Edmonds v. Hamilton Provident and Loan Society, u.s.*)

The first mortgage, by the receipt of the two sums for insurance, had been reduced to \$340.28 on the 17th January, 1916, date of final report. This does not include, I understand, costs taxed to the plaintiffs of \$41.35 in the action and \$287.76 in the Master's office, and these sums will, if so, be added and the total paid out of the money in Court. But that money in Court will have to be reduced by refund to the purchaser, as found by the Master, of \$377.05, and also by payments of prior liens to Bernardi of \$172.25 and to Gallagher \$59.75. Next after this and after the plaintiffs the balance is to go to the execution creditors the Cornwall Beef Company and Ciotti—which will more than exhaust the sale moneys, as I understand. These figures and computations to be revised by the Registrar in Toronto, if the parties do not agree.

As to costs, Wilcox did not appear on the appeal, and the plaintiffs stood neutral on the ground that either way they would get paid in full. The plaintiffs are responsible for the shape in which the report was appealed from, and moved too precipitately to confirm the report and distribute.

The purchaser is entitled to his vesting order, and the plaintiffs should get no costs beyond what is already taxed. The appellants will get their costs of appeal out of the fund in Court as a first charge before payment to the plaintiffs. The report had better be readjusted on the terms of the present judgment, so as to fix exactly the amount to be paid out to the respective parties entitled.

[APPELLATE DIVISION.]

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March 3.

REX v. LINDSAY.

Criminal Law—Incest—Sexual Intercourse with Daughter—Evidence—Proof of Marriage—Proof of Penetration and Emission—Wife of Prisoner not Called as Witness—Comment of Crown Counsel—Conviction—New Trial.

Upon the trial of the prisoner for incest, counsel for the Crown, in his address to the jury at the close of the case, commented on the fact that the prisoner's wife had failed to testify. The prisoner was convicted:—

Held, that, by reason of the said comment, the conviction was void, and there should be a new trial.

(2) That formal proof of the marriage of the prisoner with the mother of the girl, alleged to be the prisoner's daughter, with whom he committed the offence, was not necessary to sustain the conviction.

(3) That the testimony of a person who swore she saw the prisoner having sexual intercourse with his daughter was, without any evidence as to penetration or the emission of seed, sufficient to sustain the conviction.

CROWN case reserved by MULOCK, C.J. Ex., under sec. 1014 of the Criminal Code, R.S.C. 1906, ch. 146, as follows:—

The prisoner Sandford Lindsay was tried at the assizes holden at the city of Peterborough, commencing on the 15th day of February, 1916, before me, with a jury, on an indictment "that he, the said Sandford Lindsay, at the township of Dummer, in the county of Peterborough, in or about the month of July, 1915, and at divers other times during the year 1915, did cohabit with and did have sexual intercourse with one Lilly May Lindsay, being the daughter of him, the said Sandford Lindsay, and did thereby commit incest."

The prisoner was found guilty of the offence by the jury; sentence was not imposed, but postponed until the questions reserved have been decided.

In his address to the jury at the close of the case, counsel for the Crown commented on the fact that the prisoner's wife had failed to testify.

After the prisoner was found guilty, counsel for the defence requested that a question of law, with other questions of law hereinafter referred to, be reserved, as to whether the said comment rendered the trial and the conviction of the prisoner void.

During the trial no evidence was given to prove the marriage of the accused other than hearsay evidence, evidence of reputation and of cohabitation of the accused and his alleged wife.

During the progress of the trial, no evidence was given of

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penetration or the emission of seed in the alleged act of sexual intercourse between the accused and his alleged daughter, the evidence relating to that question being that of a witness who swore that she saw the accused having sexual intercourse with the said alleged daughter.

After the conviction of the accused, counsel for the defence asked that questions of law be reserved as to the sufficiency of the evidence relating to the marriage and sexual intercourse, upon the ground that the marriage was not strictly proved, and that no evidence of penetration or emission of seed was given, and made a further application that leave be given to the accused to apply to the Court of Appeal for a new trial, on the ground that the verdict was against the weight of evidence.

Pursuant to counsel's application, I have reserved the following questions:—

(1) Did the comment made by the Crown counsel as hereinbefore set out render the trial and conviction of the prisoner void?

(2) Was formal proof of the marriage of the prisoner with the mother of Lilly May Lindsay necessary to sustain the conviction?

(3) Was the evidence relating to the alleged sexual intercourse as hereinbefore set out, without any evidence as to penetration or the emission of seed, sufficient to sustain the conviction?

March 3. The case was heard by MEREDITH, C.J.O., MACLAREN and MAGEE, JJ.A., and RIDDELL and MASTEN, JJ.

D. O'Connell, for the prisoner, argued that the comment of the Crown counsel at the trial on the fact that the prisoner's wife had failed to testify was fatal to the conviction. He also urged that no sufficient evidence had been given of the marriage of the accused: *Rex v. Smith* (1908), 13 Can. Crim. Cas. 403. Nor had there been proved penetration or emission of seed.

Edward Bayly, K.C., for the Crown. Even in England, where a statute exists prohibiting such comment as that objected to, it was decided in *Dickman's Case* (1910), 5 Cr. App. R. 135, that such comment did not warrant a new trial being granted. Where no substantial wrong has been done, as here, the conviction should stand: sec. 1019 of the Criminal Code. It is not necessary to give further proof of the marriage or to shew penetration or the emission of seed.

O'Connell, in reply, said that *Dickman's Case* differed from this. There the comment had been an accidental slip, and had not affected the verdict: see p. 147 of the report.

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THE COURT, at the conclusion of the argument, answered the first question in the affirmative, and directed a new trial. The second question was answered in the negative, and the third in the affirmative.

[FALCONBRIDGE, C.J.K.B.]

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—
March 6

RE COLE.

Life Insurance—Contracts Made with Wife of Subject of Insurance—Absolute Property of Wife—Contracts by Insured for Benefit of Wife—Will of Insured—Beneficiary Cut down to Life Interest—Change of Beneficiary of Corpus within Preferred Class—Effective Designation—Codicil—Effect of—Predecease of Wife—Payment of Incumbrances—Ontario Insurance Act, R.S.O. 1914, ch. 183, secs. 169, 171 (3), (5), 178 (1), (2), (7).

There were six policies of insurance on the life of the testator. One of them was effected by the testator's wife upon his life; another was effected by the testator for the benefit of his wife, but the insurers promised and agreed to and with the said assured, her executors . . . to pay to the said assured, her executors, etc.:—

Held, that these two policies were the property of the wife, and were not affected by any declaration made by the husband: sec. 169 of the Ontario Insurance Act, R.S.O. 1914, ch. 183.

The other four policies being effected by the testator for the benefit of his wife, in respect of them a trust was created in favour of the wife (sec. 178 (2)), unless and until a declaration should be made under sec. 171 (3), and in no case could the policies be diverted from the class of preferred beneficiaries except under sec. 178 (7).

By his will, the testator gave and devised all his real and personal estate to his "executor in trust for the use of my wife . . . during her natural life . . . my said executor to collect all the life insurance, rents, interest and accounts . . . and with this money first pay off the incumbrances . . . on my real estate. . . . My executor must keep the different buildings in . . . repair and insured, and pay, out of the balance of rents and interest, all or any portion thereof to my said wife for her own use or maintenance" The testator then made devise of three parcels of land after the death of his wife, and certain specific bequests. There was then the residuary clause: "All the rest residue and remainder of my property real and personal I give and devise to my daughter." After the death of his wife, the testator executed a codicil, in which he recited the fact of her death, and said, "The portion of my said will referring to her will no longer be operative."—

Held, that the words of the will were sufficient, under sec. 171 (5) of the Act, to take away from the wife the corpus of the proceeds of the policies and to cut her down to a life interest in those proceeds, and to change the beneficiary to the daughter, who was also within the preferred class (sec. 178 (1)). The words of the codicil did not affect the declaration of the will in favour of the daughter.

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The case did not come under sec. 178 (7), as the beneficiary who predeceased the testator had only a life estate.

Re Baeder and Canadian Order of Chosen Friends (1916), *ante* 30, followed.

Held, also, that the attempt of the testator to charge the insurance fund with the payment of incumbrances was wholly ineffective.

MOTION by William H. Dingle, executor of Wilmot H. Cole, deceased, and by Cordelia E. Dingle, daughter of the deceased and administratrix of the estate of her mother, also deceased, upon originating notice, for an order determining certain questions arising upon the will and codicil of Wilmot H. Cole, in regard to certain policies of life insurance.

The testator died on the 13th December, 1915; his wife predeceased him, dying on the 9th October, 1915. The daughter, Cordelia E. Dingle, a son, George M. Cole, and a son of a deceased son, survived.

There were six policies of life insurance; particulars with regard to them are given in the judgment below.

The questions for determination were: whether the will and codicil amounted to a declaration within the meaning of the Ontario Insurance Act, R.S.O. 1914, ch. 183*; and, if not, to whom the moneys due under the policies should be paid.

*The following provisions of the Act bear on the questions raised upon the motion.

Sec. 169.—(1) It shall be necessary for the validity of a contract of insurance that the beneficiary under it, if he is not the person on whose life the insurance is effected, or the parent, or *bonâ fide* donee, grantee or assignee, or a person entitled under the will of such person, or by operation of law, shall have at the date of the contract a pecuniary interest in the duration of the life or other subject insured, but any otherwise lawful contract of annuity upon life shall not require for its validity that the annuitant has or at any time had an insurable interest in the life of the nominee.

Sec. 171.—(3) The assured may designate the beneficiary by the contract of insurance or by an instrument in writing attached to or endorsed on it or by an instrument in writing, including a will, otherwise in any way identifying the contract, and may by the contract or any such instrument, and whether the insurance money has or has not been already appointed or apportioned, from time to time appoint or apportion the same, or alter or revoke the benefits, or add or substitute new beneficiaries, or divert the insurance money wholly or partly to himself or his estate, but not so as to alter or divert the benefit of any person who is a beneficiary for value, nor so as to alter or divert the benefit of a person who is of the class of preferred beneficiaries to a person not of that class or to the assured himself or to his estate.

Sec. 171.—(5) Where the declaration describes the subject of it as the insurance or the policy or policies of insurance or the insurance fund of the assured, or uses language of like import in describing it, the declaration, although there exists a declaration in favour of a member or members of the preferred class of beneficiaries, shall operate upon such policy or policies to the extent to which the assured has the right to alter or revoke such last mentioned declaration.

Sec. 178.—(1) Preferred beneficiaries shall constitute a class and shall include the husband, wife, children, grandchildren and mother of the assured,

February 26. The motion was heard by FALCONBRIDGE, C.J.K.B., in the Weekly Court at Ottawa.

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M. M. Brown, for the applicants.

J. A. Hutcheson, K.C., for the son and grandson of the testator.

Reference was made to the following cases: *In re Cochrane* (1908), 16 O.L.R. 328; *Re Cheesborough* (1897), 30 O.R. 639; *Re Kloepper* (1913), 5 O.W.N. 133; *Re Clarke* (1915), 8 O.W.N. 613; *Re Standard Life Assurance Co. and Keefer* (1915), 34 O.L.R. 235, 427.

March 6. FALCONBRIDGE, C.J.K.B.:—The late Wilmot H. Cole died on the 13th December, 1915; his wife, Jane Adelaide Cole, predeceased him, dying on the 9th October, 1915. They had three children: (1) Eugene M. Cole, who died leaving a sole child; (2) George M. Cole; and (3) Cordelia E., wife of William H. Dingle—illustrated as follows:—

Wilmot H. Cole	=====	Jane Adelaide Cole
ob. Dec. 13, 1915.		ob. Oct. 9, 1915.
Eugene M. Cole		Geo. M. Cole
ob.		Cordelia E. (administratrix Jane Adelaide)
		md. Wm. H. Dingle, executor of testator.
Wilmot L. Cole		

There were six policies of insurance on the life of the testator, as follows:—

A. Policy for \$1,000, January 6, 1864, effected by Jane Adelaide Cole on the life of her husband, the testator.

and the provisions of this and the following three sections shall apply to contracts of insurance for the benefit of preferred beneficiaries.

Sec. 178.—(2) Where the contract of insurance or declaration provides that the insurance money or part thereof, or the interest thereof, shall be for the benefit of a preferred beneficiary or preferred beneficiaries such contract or declaration shall, subject to the right of the assured to apportion or alter hereinafter provided, create a trust in favour of such beneficiary or beneficiaries, and so long as any object of the trust remains the money payable under the contract shall not be subject to the control of the assured, or of his creditors, or form part of his estate, but this shall not interfere with any transfer or pledge of the contract to any person prior to such declaration.

Sec. 178.—(7) If one or more or all of the designated preferred beneficiaries, whether an apportionment has been made or not, die in the lifetime of the assured or if a sole preferred designated beneficiary dies in his lifetime, he may by a declaration provide that the share or shares of the person or persons so dying shall be for the benefit of the assured or of his estate or of any other person, whether or not such person belongs to the preferred class; . . .

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B. Policy for \$2,000, February 21, 1871, by testator on his own life "for the benefit of his wife, Jane Adelaide Cole."

C. Policy for \$5,000, September 15, 1874, by testator on his own life "for the benefit of his wife, Jane Adelaide Cole."

D. Policy for \$2,000, December 31, 1868, by testator "for the benefit of Jane A. Cole," but the company "promise and agree to and with the said assured, her executors . . . to pay to the said assured, her executors . . . the sum insured."

E. Policy for \$500, December 23, 1883, the O.F.R.A. of Canada "agrees to pay to Jane A. Cole, wife, or her heirs or assigns," but it is clear that the agreement is not made with the wife, but with the husband, "the member herein insured."

F. Policy for \$1,000, December 21, 1883, in similar terms to those of E. By a will made on the 17th October, 1914, the testator made the following provisions:—

"I give and devise all my real and personal estate . . .

"1. To my executor in trust for the use of my wife, Jane Adelaide Cole, during her natural life, all my estate, real and personal, my said executor to collect all the life insurance, rents, interest and accounts due me at my death and with this money first pay off the incumbrances, if any, on my real estate except balance of monthly payment mortgage to the Brockville Loan and Savings Company on west part of lot No. 18 in block 44 in the town of Brockville, which balance is to be paid from the rents from the property as the monthly payments become due. My executor must keep the different buildings in a good state of repair and insured, and pay, out of the balance of rents and interest, all or any portion thereof to my said wife for her own use or maintenance, she to reside where she may see fit or choose to make her home, her comfort and welfare to be a first charge on my estate."

2. Devise of certain land after death of wife.

3. " " other " " "

4. " " " " "

5. Bequest of promissory notes.

6. Specific bequest.

7. do.

8. do.

And the residuary clause, "All the rest residue and remainder

of my property real and personal I give and devise to my daughter Cordelia E. Dingle."

After the death of his wife, he made a codicil, of which the important parts are as follows: "As my beloved wife Jane Adelaide Cole departed this life on October 9, 1915, the portion of my said will referring to her will no longer be operative."

William H. Dingle is the executor of the will of the testator, and his wife, Cordelia E. Dingle, is the administratrix of her mother's estate.

The questions for determination on this application are:—

1. Does the will or the codicil to the will of the said Wilmot H. Cole, deceased, constitute a declaration within the meaning of the Ontario Insurance Act whereby the moneys due and owing under the several insurance policies on the life of the said W. H. Cole, deceased, should be paid to the executor of the said W. H. Cole to be by him applied, firstly, in payment of the incumbrances on the real estate as provided in clause 1 of said will, and, secondly, to pay over the balance, if any, to Cordelia E. Dingle pursuant to the residuary clause of the said will?

2. If the confirmation of the will by the said codicil does not constitute a declaration within the meaning of the Ontario Insurance Act, so that the moneys under the several policies on the life of the said testator belong to his estate to be distributed according to the terms of his will, then to whom are the moneys due and owing on the said several policies payable?

As to policy A., the contract is with Jane Adelaide Cole, and not with her husband—and it was therefore the property of Mrs. Cole absolutely; it is not a policy on the life of the husband under secs. 171 and 178 of the Ontario Insurance Act, R.S.O. 1914, ch. 183—it comes under sec. 169; accordingly, the will and codicil of the husband cannot affect it.

So too, policy D. is a contract "with the said assured, *her* executors," etc., to pay to the said assured, *her* executors, etc. This is, therefore, not a contract with the husband, but with the wife, and she it is who is called the "assured;" accordingly, the will and codicil cannot affect this policy.

Policy B. is explicitly an insurance by the husband for the benefit of his wife, Jane Adelaide Cole, and therefore comes under secs. 171, 178.

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Policy C. is in the same case.

Policy E. is a contract "to pay to Jane A. Cole, wife, or her legal representatives . . .," but it is a contract with the husband, not with the wife, and therefore it comes under secs. 171, 178.

Policy F. is in the same case.

The same considerations govern the four policies B., C., E., and F.

Section 178 (2) creates in these a trust in favour of the wife, unless and until a declaration is made under sec. 171 (3), and in no case can the policy be diverted from the class of preferred beneficiaries except in cases such as are provided for in sec. 178 (7).

Accordingly, at the time the will was made, the insured could have altered the trusts of these four policies by giving the benefit to those of or one or more of the preferred class mentioned in sec. 178 (1); but, unless and until such alteration should be legally effected, the wife was entitled to the benefit of the policies.

It was argued with great wealth of authority that the words of the will "all the life insurance," etc., were not sufficient under the Act. Probably that is so, had there been no change in the legislation. But a change was made after the decision of the cases cited on the argument, viz., in 1912 by 2 Geo. V. ch. 33, sec. 171 (5), now R.S.O. 1914, ch. 183, sec. 171 (5), which seems to have been overlooked by counsel.

This has been very recently discussed by the Appellate Division in *Re Baeder and Canadian Order of Chosen Friends* (1916), 9 O.W.N. 462.* I have procured full copies of the judgments in that case, and find all the previous cases there discussed in the judgment of my brother Riddell, which I adopt and to which I have nothing to add.

The effect of that decision is, that a bequest of "all my insurance that I may have and in force at the time of my death" is a sufficient declaration by will to change the beneficiary of such policies. Here the words are not quite the same, but they are "language of like import" (sec. 171 (5)), and it must be held that, so far as the form goes, the declaration is effective.

The effect of the declaration is to take away from the wife the corpus of the proceeds of the policies and to give her only a life interest in these proceeds—the corpus is not in terms disposed of.

*Now reported, *ante* 30.

But the deceased created a fund in part composed of these policies, and, disposing of a life interest in it, he has added "all the rest, etc., I give to my daughter Cordelia E. Dingle."

The case is not unlike that of *Re Edwards* (1910), 22 O.L.R. 367, except that there the corpus was given to persons not in the preferred class—and it was on that ground that it was held that the testator had not the power to change the beneficiaries as he had intended: see pp. 368–9. Had the corpus been given to some one of the preferred class, of course the change would have been held effective.

I am of opinion, on the whole, that the declaration in and by the will was effective to change the beneficiary, so that, had his wife survived him, she would have taken for life, and the corpus would have gone to the daughter.

As to the codicil, there is simply a statement of fact as the testator understood it; at the most there was a revocation of the trust for life of the proceeds of the policies, without affecting or purporting to affect any other disposition or the rights of any other person.

We are not to read such documents too subtly, but to see what the testator meant—and it would be a great stretch to hold that the testator meant by such a clause to take away the corpus of the insurance fund from his daughter without even naming her. The terms of the will do not compel me so to hold, and I decline to do so.

The attempt of the testator to charge the insurance fund with the payment of incumbrances is, of course, wholly ineffective.

In the result, the wife's estate is held entitled to the two policies A. and D.—the daughter, Mrs. Dingle, to the other four, without diminution to pay incumbrances.

In the view I take of the law, the case does not come under sec. 178 (7), as the beneficiary who predeceased the testator had only a life estate.

Of the policies belonging to the estate of the wife, the estate of the husband will, of course, be entitled to his proportionate part.

As the case is decided upon the judgement in *Re Baeder and Canadian Order of Chosen Friends*, delivered but a few days ago, costs of all parties may come out of the four policies; no reason exists for saddling the other two with costs.

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[APPELLATE DIVISION.]

March 13.

GEORGE V. LANG.

Mortgage—Action for Foreclosure Brought without Leave—Interest Accruing de Die in Diem under Special Provision—Interest not otherwise in Arrear—Mortgagors and Purchasers Relief Act, 1915, secs. 2 (1), 4 (3)—Exception as to Interest—Onus.

By the Mortgagors and Purchasers Relief Act, 1915, 5 Geo. V. ch. 22 (O.), the enforcement of payment of the principal money payable upon a mortgage is (sec. 2 (1)) prohibited during the war. There is an exception (sec. 4 (3)) as to interest, taxes, etc.; but the onus of shewing that his claim comes within the exception is upon the mortgagee; and the exception applies only to interest contracted, in the ordinary manner, to be paid; it does not apply to interest accruing *de die in diem* by reason of a special provision in the mortgage—if that was indeed the meaning of an obscure provision contained in the mortgage-deed in this case (set out below).

An order of CLUTE, J., dismissing an action for foreclosure brought by a mortgagee, without the leave of a Judge (sec. 2 (1)), where there had been no default in payment of the regular gales of interest, was affirmed.

APPEAL by the plaintiff from an order of CLUTE, J., in Chambers, setting aside the writ of summons and dismissing the action, which was brought (without the leave of the Court) to enforce by foreclosure a mortgage made before the 4th August, 1914.

The mortgage-deed contained these provisions:—

“The said mortgagors, for themselves, their heirs, executors, administrators, and assigns, covenant with the said mortgagee, his executors, administrators, and assigns, that they will keep the said lands and buildings and improvements thereon in good condition and repair according to the nature and description hereof respectively; and that the mortgagee, his executors, administrators, and assigns, may, whenever he or they deem necessary, by his or their surveyor or agent, enter upon and inspect the said mortgaged lands, and the reasonable cost of such inspection shall be added to the mortgage-debt; and that, if the mortgagors or those claiming under them neglect to keep the said premises in good condition and repair or commit any act of waste on the said lands or *make default as to any of the covenants or provisoes herein contained*, the principal hereby secured shall, at the option of the mortgagee, his executors, administrators, or assigns, forthwith become due and payable; and, in default of payment of same with interest, as in the case of payment before maturity, the powers of entering upon and leasing or selling hereby given may be exer-

cised forthwith; and the mortgagee, his executors, administrators, or assigns, may make such repairs as he or they deem necessary, and the cost thereof shall be a charge upon the land prior to all claims thereon subsequent to these presents."

"Provided that the mortgagee may distrain for arrears of interest. Provided that, in default of the payment of the interest hereby secured, the principal hereby secured shall become payable."

March 13. The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and MASTEN, JJ.

Frank Arnoldi, K.C., for the appellant, argued that, as the Mortgagees and Purchasers Relief Act, 1915,* made an exception in favour of interest in arrear, the appellant (mortgagee) might proceed with his ordinary remedies, such as foreclosure and sale, without seeking the sanction of the Court; this exception applied where interest was in arrear even for a day, and particularly where a special clause in the mortgage, as here, made interest payable *de die in diem*; and consequently the order appealed from was wrong, and the appellant should be allowed to proceed with his action. On the question of interest accruing from day to day, he referred to *In re Rogers' Trusts* (1860), 1

*The following provisions of the Mortgagees and Purchasers Relief Act, 1915, 5 Geo. V. ch. 22 (O.), are applicable to the case in hand:—

Sec. 2.—(1) No person shall:—

(a) take or continue proceedings by way of foreclosure or sale or otherwise, or proceed to execution on or otherwise to the enforcement of, any judgment or order of any Court, whether entered or made before or after the passing of this Act, for the recovery of principal money secured by any mortgage of land or any interest therein made or executed prior to the fourth day of August, 1914;

* * * * *

except by leave of a Judge granted upon application as hereinafter provided.

Sec. 4.—(3) Where default is made in payment of interest, rent, taxes, insurance or other disbursements which the mortgagor or purchaser has covenanted or undertaken to pay, the mortgagee or vendor, his assignee, or personal representative shall have the same remedies, and may exercise them to the same extent, and the consequences of such default shall in all respects be the same as if this Act had not been passed, but where such interest, rent, taxes or other disbursements are paid into court or tendered to the mortgagee, vendor, assignee or personal representative he shall not continue any proceedings already commenced by him without the order required by section 2 or by section 3, as the case may be.

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Dr. & Sm. 338; Fisher's Law of Mortgage, 6th ed., para. 1808; Coote's Law of Mortgages, 8th ed., p. 1185.

A. J. Reid, K.C., for the defendants the Glenlaxon Land Company.

W. N. Tilley, K.C., for the other defendants, contended that the exception applied only to interest contracted to be paid in the ordinary way—where there was default in payment of interest on a gale-day. At any rate, the wording of the clause in question was so obscure that it should not be allowed to override the clear words of the mortgage dealing with the payments:

Arnoldi, in reply.

March 13. MEREDITH, C.J.C.P.:—I think the Judge below was quite right in dismissing this action. It seems to me to be brought in the teeth of the Mortgages and Purchasers Relief Act, 1915. The Act left it open to mortgagees to enforce payment of the incidentals of a mortgage, the interest, taxes, and so forth; but not to enforce, by action, payment of the principal without the leave of a Judge. "Interest" means the interest which the mortgagor has covenanted to pay. If he pay that, he is not to be prosecuted in any action upon the mortgage for principal money, without the leave mentioned. It is against the spirit, as well as the letter, of the Act to commence an action of this kind without such leave. The Act takes away the right of action for principal money due on the mortgage, then makes an exception of the interest etc. The onus is upon the plaintiff of shewing that his claim comes within the exception. In my judgment, the exception applies only to interest contracted, in the ordinary manner, to be paid. I do not think it applies to interest such as Mr. Arnoldi contends is payable *de die in diem* under the clause of the mortgage relied upon by him. Nor do I think that the case comes within the provisions of that clause. There are the usual clauses in the mortgage, dealing with payment of principal and interest, one of which provides that, in default of the payment of interest, the principal secured shall become payable. I decline to give to the obscure words of this clause an effect differing from the plain effect of the words of the mortgage dealing directly and solely with such payments. They may very well be applicable only to the default dealt with in it.

MASTEN, J.:—I agree, and will add only one word. If the contention of Mr. Arnoldi on behalf of the plaintiff were maintained, it would practically nullify the effect of the statute whenever the mortgage contained a covenant to pay interest on overdue principal. Most well-drawn mortgages contain such a covenant, and this customary form was well known to exist when the statute was passed. The statute ought not to be construed in such a way as to nullify its effect. If the construction contended for were maintained, the result would be that, whenever principal falls due (for which no action can be instituted without leave), the mortgagee only has to wait until the close of the next day, when one day's interest would fall due and be payable under the covenant, and he could launch his action without leave, because that interest was due under a covenant.

For this reason, my opinion is, that the statute is to be construed as relating only to the regular gales of interest falling due at the periods mentioned in the mortgage.

RIDDELL and LENNOX, JJ., concurred.

Appeal dismissed with costs.

[APPELLATE DIVISION.]

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Liquor License Act—Conviction for Offence against—Evidence—Amendment of Information—Adjournment—Waiver—Sec. 92 of Act—Jurisdiction of Convicting Magistrate—Place of Offence—Judicial Notice—Police Magistrates' Act, R.S.O. 1914, ch. 88, secs. 24, 28—Imprisonment in Default of Payment of Fine and Costs—Warrant of Commitment—Habeas Corpus—Jurisdiction to Commit—Sec. 65 of Liquor License Act—Charges for Conveying to Gaol—Statement in Warrant—Irregularity—Amendment—Criminal Code, secs. 1121, 1124—Ontario Summary Convictions Act, R.S.O. 1914, ch. 90, sec. 4—Sec. 94 (2) of Liquor License Act—Illegality of Caption—Legality of Detention—Refusal of Judge to Discharge Prisoner—Right of Appeal—Certificate of Attorney-General—Sec. 113 (1) of Act.

The defendant was convicted of two offences against the Liquor License Act, R.S.O. 1914, ch. 215, by a magistrate, described in the conviction as "Police Magistrate in and for the City of Belleville and the southern part of the County of Hastings and one of His Majesty's Justices of the Peace in and for the County of Hastings." The prisoner was not present at the hearing before the magistrate, but was represented by counsel, who pleaded "not guilty" to both charges. The evidence shewed that the defendant had sold intoxicating liquor in violation of the Act, but on a

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day different from that stated in the information; and an application to amend the information was made. Counsel for the defendant did not consent to the amendment, nor did he shew cause why it should not be made, except by saying that it might prejudice his client. He did not ask for an adjournment, which the magistrate was bound to accord, under sec. 92 of the Act, if the amendment really prejudiced the defendant:—

Held, that the defendant had waived the right granted him by the statute.

The information, conviction, and warrant stated that the offence was committed at the township of Thurlow, in the county of Hastings:—

Held, that judicial notice might be taken of the fact that the township of Thurlow is in the southern part of the county of Hastings; but, at any rate, the magistrate, as Police Magistrate for the City of Belleville, was, by virtue of sec. 24 of the Police Magistrates' Act, R.S.O. 1914, ch. 88, *ex officio* a Justice of the Peace for the whole county, and, so acting, had, under sec. 28, power to do alone whatever was authorised to be done by two Justices; exercising that jurisdiction, he had power to convict the defendant, and his jurisdiction was manifested on the face of the proceedings.

Held, also, that jurisdiction to convict gave jurisdiction to commit in default of payment of the fine and costs: sec. 65 of the Liquor License Act; and, although the magistrate was not justified in stating or estimating on the face of the warrant of commitment the amount of the costs and charges of conveying the defendant to gaol, yet, as the warrant stated the conviction of the prisoner, and there was a good and valid conviction to sustain the commitment, the warrant was not void, and should be amended by striking out the objectionable words and figures: secs. 1121 and 1124 of the Criminal Code (incorporated in the Ontario Summary Convictions Act, R.S.O. 1914, ch. 90, by sec. 4); sec. 94 (2) of the Liquor License Act.

Held, also, that the right of the defendant to be discharged from custody under the warrant of commitment did not depend on the legality or illegality of the caption, but on the legality or illegality of the detention.

Rex v. Whitesides (1904), 8 O.L.R. 622, followed.

These points were decided by LATCHFORD, J., upon a motion in Chambers, upon the return of a *habeas corpus*, for the discharge of the defendant.

Held, by a Divisional Court of the Appellate Division, that, in the absence of a certificate from the Attorney-General, as provided in the Liquor License Act, sec. 113 (1), an appeal from the order of LATCHFORD, J., refusing to discharge the defendant, could not be entertained.

Rex v. Graves (1910), 21 O.L.R. 329, approved.

MOTION on the return of a writ of *habeas corpus* for an order discharging the defendant from custody in the common gaol of the county of Hastings.

February 29. The motion was heard by LATCHFORD, J., in Chambers.

J. B. Mackenzie, for the defendant.

J. R. Cartwright, K.C., for the Crown.

March 11. LATCHFORD, J.:—Motion on return of a writ of *habeas corpus* for the discharge from the common gaol of the county of Hastings of one Joseph Gage, who is there imprisoned under a warrant issued on the 10th August, 1914, by S. Masson, who describes himself as "Police Magistrate in and for the City

of Belleville and one of His Majesty's Justices of the Peace in and for the said County of Hastings," and as "Police Magistrate for the southern part of the County of Hastings."

Gage was convicted before Mr. Masson on the 10th August, 1914, of two breaches of the Liquor License Act—selling liquor without a license on the 31st July, 1914, and keeping liquor for sale without a license on the 1st August, 1914. The prisoner was not present, but was represented by counsel, who, on his behalf, entered a plea of "not guilty" to each charge. It was agreed, according to the memorandum made by the magistrate, "that the evidence shall be taken in both cases at once and used in both."

After evidence had been given of a sale, not, as stated in the information, on the 1st August, but on the 31st July, an application was made to change the date in the information so as to make it conform to the evidence. Counsel for Gage did not consent to the amendment, or "shew any cause why it should not be made, beyond saying it may prejudice his client." He did not, however, ask for the adjournment, which the magistrate was bound to accord, under sec. 92 of the Act, if the amendment really prejudiced the accused, and must, in my opinion, be taken to have waived the right granted him by the statute.

The prisoner was found guilty upon both charges, upon ample evidence, and a fine of \$250 and costs was imposed in each case. Gage had left the vicinity of Belleville at the time of the trial. Warrants for his arrest were immediately issued, and under one of such warrants he was arrested on the 7th February, 1916, at Orillia, by the Chief of Police of that town, and on the 9th February delivered by him to a Belleville constable, who conveyed Gage to prison and handed to the gaoler the warrant of commitment returned to the writ. According to Gage, a second warrant of commitment, in default of payment of the fine and costs imposed for illegally keeping liquor for sale, was handed to the gaoler at the same time. Such warrant was undoubtedly issued and is produced, but it is not the warrant under which the prisoner is stated by his gaoler to be detained.

The principal objections urged on behalf of the prisoner are: that the jurisdiction of the convicting magistrate is not shewn by the commitment, or in the conviction which it recites; and that costs of commitment, as well as of conveyance—costs other

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than costs of prosecution—have been wrongfully inserted in the warrant.

The information, conviction, and warrant state that the offence of which the prisoner was found guilty was committed at the township of Thurlow, in the county of Hastings. The conviction upon its face states that Gage was convicted before "Stewart Masson, Police Magistrate in and for the City of Belleville and the southern part of the County of Hastings and one of His Majesty's Justices of the Peace in and for the County of Hastings."

The township of Thurlow is in the county of Hastings: The Territorial Division Act, R.S.O. 1914, ch. 3, sec. 2 (15); and I think I can take judicial knowledge of the undoubted fact that it is in the southern part of the county of Hastings. In England, where the boundaries of towns and parishes are determined by ancient usage, and not as here by legislative or departmental acts, the excessive particularity of the Courts obliged them to reject what is obvious in Ontario in our day. An example of this refinement may be found in *Rex v. Burridge* (1735), 3 P. Wms. 439, at p. 496. A similar case is *Deybel's Case* (1821), 4 B. & Ald. 243.

But recourse to judicial knowledge is unnecessary, in view of the fact that in both the conviction and the warrant the magistrate is described as Police Magistrate for the City of Belleville. By sec. 24 of the Police Magistrates' Act, R.S.O. 1914, ch. 88, Mr. Masson was *ex officio* a Justice of the Peace for the whole county, and, acting as such *ex officio* Justice, had, under sec. 28, power to do alone whatever was authorised to be done by two or more Justices of the Peace. Acting as a Justice of the Peace for the county and exercising the jurisdiction of two Justices, he had power to convict the prisoner as he did convict him, and his jurisdiction is manifested on the face of the proceedings. The unreported case of *Rex v. Collins* (decided by the Court of Appeal for Ontario, May 29, 1901), to which I have been referred, has therefore no application.

Jurisdiction to convict gave jurisdiction to commit in default of payment of the fine and costs: sec. 65 of the Liquor License Act. The form (No. 11) of the warrant of commitment prescribed by sec. 91 of the statute was followed by the magistrate.

He, however, stated the "costs and charges of carrying him (Gage) to the said common gaol" to be \$4.41, and in the margin set out the following items: "Arrest \$1.50, mileage 0.91, rig to convey him to gaol \$2.00."

While the costs and charges of conveying Gage from Orillia to Belleville must have been greatly in excess of \$4.41, the magistrate was not, in my opinion, justified in stating or estimating the amount of such costs and charges on the face of the warrant of commitment. But, under sec. 1121 of the Criminal Code, incorporated by reference into the Ontario Summary Convictions Act, R.S.O. 1914, ch. 90, sec. 4, "No warrant or commitment shall be held void by reason of any defect therein, provided it is therein alleged that the defendant has been convicted, and there is a good and valid conviction to sustain the same."

In this case the commitment alleges the conviction of the prisoner, and there is a good and valid conviction to sustain the commitment.

Section 1124 of the Code is also made part of the Ontario statute, and applies in the circumstances disclosed in the depositions and conviction. There can be no possible doubt of the guilt of the prisoner. The punishment imposed on him was not in excess of what might lawfully be imposed. The warrant therefore is not to be held invalid for the irregularity.

Section 94 of the Liquor License Act declares that no conviction or warrant enforcing the same shall be held invalid by reason of any defect in form or substance, if it can be understood, as here, that the conviction or warrant was made for an offence against some provision of the Act, within the jurisdiction of the magistrate who made or signed the same; and if, as here, there is evidence to prove the commission of such offence.

Sub-section 2 of the same section gives me power, in the circumstances existing in this case, to amend the warrant. I do so by striking out the words and figures stating the costs and charges of conveying the prisoner to gaol.

The objections as to the arrest of the prisoner at Orillia are untenable. His right to discharge does not depend on the legality or illegality of his caption, but on the legality or illegality of his detention: *Rex v. Whitesides* (1904), 8 O.L.R. 622.

The application fails and is dismissed. No costs.

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The defendant appealed from the order of LATCHFORD, J.

March 17. The appeal was heard by GARROW, J.A., RIDDELL, LENNOX, and MASTEN, JJ.

J. B. Mackenzie, for the defendant. As to the right of appeal, *Rex v. Teasdale* (1910), 20 O.L.R. 382, decides that an appeal lies from the refusal to discharge a prisoner held in custody by virtue of a conviction under the Liquor License Act, notwithstanding the special and apparently conflicting provisions of that Act. The right to appeal to a Divisional Court from the order of a Judge in Chambers, which is given by authority of the Judicature Act, has been conferred by words so all-inclusive as to embrace the proceeding here, even though a general right of appeal—limited, however, to the case of a prisoner who has been remanded to the gaoler's custody—is given by the Ontario Habeas Corpus Act, R.S.O. 1914, ch. 84, sec. 8. Singularly enough, too, in this connection, although the Divisional Court recognised as the forum to which the appeal prior to the Law Reform Act was required to be taken, has, *eo nomine* at least, ceased to have existence, both sec. 112 of the Liquor License Act, providing the conditional appeal, and sec. 8 of the Habeas Corpus Act, retain the name "Divisional Court." The probable, if not necessary, effect of the Court's upholding the prisoner's contention is to extend the privilege in question to the Crown, where the initial motion for a grant of the writ is concerned, so annulling the old common law practice of going from Judge to Judge or from Court to Court. This very point was in fact determined by the House of Lords in *Barnardo v. Ford*, [1892] A.C. 326; and the law as to this highly controversial point, which had been freely canvassed with no appreciable result by the same tribunal, in *Cox v. Hakes* (1890), 15 App. Cas. 506, definitely settled. *Rex v. Ackers* (1910), 21 O.L.R. 187, is in harmony with *Barnardo v. Ford*.

J. R. Cartwright, K.C., for the Crown, was not called upon.

THE COURT held that, in the absence of a certificate from the Attorney-General, as provided in the Liquor License Act, R.S.O. 1914, ch. 215, sec. 113 (1), the appeal could not be entertained—approving *Rex v. Graves* (1910), 21 O.L.R. 329.

Appeal dismissed.

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RE J. F. BROWN CO. LIMITED AND CITY OF TORONTO.

Municipal Corporations—Erection of Urinals upon and under Public Highway in City—Injurious Affection of Property Abutting on Highway—Depreciation in Value—Liability of City Corporation to Make Compensation—Arbitration and Award—Municipal Act, R.S.O. 1914, ch. 192, secs. 325, 406 (8).

The four Judges composing a Divisional Court were equally divided in opinion as to the right of land-owners, claimants under sec. 325 of the Municipal Act, to compensation for the injurious affection of their land, upon which they had built, and were carrying on the business of, a departmental store, by the erection and maintenance by the municipality, upon and under a city street on which the land abutted, of public conveniences (lavatories, urinals, etc.), no land of the claimants having been taken, and the highway not being obstructed; and an award of compensation was, in the result, affirmed.

Discussion of the effect of sec. 406 (8) of the Act, authorising the erection of such conveniences; and review of the authorities.

AN appeal by the city corporation (contestants) and a cross-appeal by the company (claimants) from the finding and award of P. H. Drayton, K.C., Official Arbitrator, upon an arbitration to ascertain the compensation or damages, if any, to be paid to the company for the injurious effect upon their property caused by the construction by the city corporation of public conveniences (men's and women's lavatories, urinals, and water-closets) under and upon a highway in the city. The claimants' property consisted of land and a departmental store erected thereon, quite near the public conveniences mentioned. The Official Arbitrator awarded the claimants \$10,200. The contestants appealed on the ground that nothing should have been allowed, and the claimants on the ground that more should have been allowed.

January 31. The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and MASTEN, JJ.

Irving S. Fairty, for the contestants. No portion of the claimants' property having been taken or physically interfered with by the contestants, the claimants are not entitled to recover any compensation from the contestants by reason of the matters referred to in the award: Municipal Act, R.S.O. 1914, ch. 192, sec. 406, clause 8, and sec. 325; 3 Edw. VII. ch. 19, sec. 437. The damage or loss must be such as would have been actionable outside of the statutory powers: *Ricket v. Metropolitan R.W. Co.* (1867), L.R.

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2 H.L. 175, at p. 198; *Metropolitan Board of Works v. McCarthy* (1874), L.R. 7 H.L. 243; *Rex v. Directors of Bristol Dock Co.* (1810), 12 East 429; *Re Penny and South Eastern R.W. Co.* (1857), 7 E. & B. 660; *Horton v. Colwyn Bay and Colwyn Urban District Council*, [1908] 1 K.B. 327; *Canadian Pacific R.W. Co. v. Gordon* (1908), 8 Can. Ry. Cas. 53; *Hall v. Mayor, etc., of Bristol* (1867), L.R. 2 C.P. 322. The damage must be occasioned by the construction of the authorised works, and not by their user: *Hammersmith, etc., R.W. Co. v. Brand* (1869), L.R. 4 H.L. 171; *Grand Trunk Pacific R.W. Co. v. Fort William Land Investment Co.*, [1912] A.C. 224; *Re Tveit and Canadian Northern R.W. Co.* (1912), 25 W.L.R. 188; *Attorney-General v. Metropolitan R.W. Co.*, [1894] 1 Q.B. 384; *Re McQuesten and Toronto Hamilton and Buffalo R.W. Co.* (1898), 2 O.W.R. 721. A public lavatory is not of necessity a nuisance: *Vernon v. Vestry of St. James Westminster* (1880), 16 Ch.D. 449; *Biddulph v. St. George's Vestry* (1863), 3 D. J. & S. 493; *Graham v. Corporation of Newcastle-on-Tyne* (1892), 67 L.T.R. 260.

G. W. Mason and F. C. Carter, for the claimants. By reason of the wide terms of our Act, it must have been intended that the owner should have compensation: *Regina v. St. Luke's Vestry* (1871), L.R. 7 Q.B. 148, and particularly at p. 153. At common law, the erection of an urinal would have been a nuisance. The claimants have suffered financial loss greater than that to others in the vicinity, not only by interference with access, but also by smoke, odours, seepage, and from other causes. The contestants have a right to injure property only on paying compensation. Reference to the following cases: *Chamberlain v. West End of London and Crystal Palace R.W. Co.* (1862), 2 B. & S. 605; *In re Wadham and North Eastern R.W. Co.* (1884), 14 Q.B.D. 747; *Metropolitan Board of Works v. Howard* (1889), 5 Times L.R. 732; *Campbell v. Paddington Corporation*, [1911] 1 K.B. 869, and particularly at p. 876.

Fairty, in reply.

March 17. MEREDITH, C.J.C.P.:—Search as one may for a foundation upon which to place the award in question, the only real one that can be discovered is this: that the property in question is worth less now, for the purposes in which it is now employed, than it was before the construction of the public conveniences in

question. That seems to have been a captivating consideration with the arbitrator, and one from which it seems to be even here difficult to dispel the glamour: though it ought to be very plain that it alone affords no foundation for the award. That ought to be very plain from the analogous cases suggested in argument: the case, for instance, of the municipal corporation acquiring land on both sides of the land-owner's building, and placing one of these necessary conveniences in each place: or the erection of a public school, or a hospital, on the adjoining lot; all cases in which the depreciation in value would be much greater, but no one could suggest that any one of them would be a case for compensation.

Before approaching a case of this kind in a reasonable frame of mind, one must overcome the prejudice arising from the mere fact of depreciation: one must strive to see what it is that is depreciated: if it be, as it is more than likely to be, merely an unearned value, a value attributable to the work and money of neighbouring land-owners and of the municipal corporation, it is obviously something that does not belong to the land-owner at all, but is something which can be taken away as freely as it may have been given: unless there is some contract or law to the contrary, every land-owner may put his own land to such lawful uses as he sees fit; quite regardless whether it enhances or depreciates the value of adjacent lands.

Now let us consider for a moment what has been done:—

The municipal corporation, as conservators of the public ways within their municipality, have constructed, solely in the interests and for the benefit of the travelling public, under one of their highways, such conveniences as the interests of public health and public decency need and demand: and on the other hand the arbitrator has awarded to this one land-owner over \$10,000 for damage to property that is said to have cost him only \$27,000, merely because these conveniences are in the highway upon which one side of his land abuts; with the logical result that every land-owner in the vicinity has an equally good claim for damages, and with the further result that these needs of the public are prohibited, the damages putting their cost at perhaps five times the value of the land-owner's property: or, to put it in another way, it would be more profitable for the municipal corporation to buy the lot adjoining this land-owner's lot, and

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erect there a convenience of palatial dimensions, than to make use of the unused soil under the highway for that purpose. There must of course be something radically wrong with an award that may lead to such results.

The first thing that is wrong with the award is: that it is in the teeth of the authorities, of which the arbitrator seems to have been aware, but which he seems to have thought he might get around, because the enactment expressly permitting the passing of by-laws for the construction of such conveniences provides also for their "maintenance:" Municipal Act, sec. 406 (8). But all works, whether railways or conveniences or anything else, must be maintained. The compensation (sec. 325) is for land expropriated for the purposes of the corporation, or injuriously affected by the exercise of its powers: that is, its powers affecting land directly. There has been no change in the law in this respect: and so there can be, in my opinion, no excuse for altering the practice upon this subject: and the less so in view of the recent cases of *Grand Trunk Pacific R.W. Co. v. Fort William Land Investment Co.*, [1912] A.C. 224, and *Holditch v. Canadian Northern Ontario R.W. Co.*, [1916] A.C. 536, which are quite in point, and, in my judgment, conclusive against this award. The Railway Act under which those cases, and other cases, were all decided in the same way, is quite as favourable to the land-owner as the Municipal Act; it provides that the company shall make full compensation to all persons interested for all damage by them sustained by reason of the exercise by the company of the powers conferred upon them by that Act or by any special Act.

But, quite apart from the cases, upon what ground can this award be supported? Apply to it any of the usual tests and it fails as to all; though failure as to one would defeat it: see *Westminster Corporation v. London and North Western R.W. Co.*, [1905] A.C. 426; *W. H. Chaplin & Co. Limited v. Westminster Corporation*, [1901] 2 Ch. 329; and *Rowley v. Tottenham Urban District Council*, [1914] A.C. 95; *S.C., sub nom. Tottenham Urban District Council v. Rowley*, [1912] 2 Ch. 633.

Is the injury, if any, made lawful only by the enactment which provides for compensation? My unhesitating answer is: No. The construction of such conveniences would be lawful and proper under the rights and duties of municipal corporations respecting

highways and traffic. The wide character of those rights and duties is not everywhere understood. In this Province not only does the duty to keep all highways in repair devolve upon the municipal corporations; and not only are they made answerable in damage for neglect of such duty; but they have complete jurisdiction over them, and even the soil and freehold of them is vested in them; and they may sell, for their own benefit, the timber and minerals in them. They have these rights subject of course to the paramount purposes as highways, as their duties respecting the repair of them make plain: but it would be idle to say that as conservators of such public ways their powers are not very extensive; that they may not do largely as they deem best with them, so long as there is no curtailment of the right of way over them. No one will deny their right to turn a mud road into a paved street, with sidewalks, kerbs, and gutters, street lights, and other needs and conveniences for traffic: can any one with any more reason deny their right to build in the soil, under the highway, closets and urinals such as the needs of man imperatively demand? Provided of course that there is no substantial obstruction of the rights of traffic; which there need never be. The need of such conveniences is in a way greater than the need of raised sidewalks. No case has been referred to that conflicts with this view of the rights and duties of municipal corporations under the laws of this Province. I decline to waste time in discussing cases in which an obstruction has been placed in a highway by a mere wrong-doer; such cases can afford no kind of assistance in seeking for a limit to the powers and duties of conservators of public highways endowed by Parliament with the widest kind of interests and rights in such ways.

Then would the construction and maintenance of these conveniences have been actionable but for the expressed statutory power? What right of action could the land-owner have? For obstruction of the highway, none, because there is no obstruction: not as much as if there were a shaft to win minerals or troughs to water man and beast, or street lights, or sidewalks; and not only none detrimental to travellers, but, instead, these are a benefit and a need supplied to them. And, if an obstruction to a highway, indictment would be the only remedy. There is no special injury to any property right of the land-owner: he would suffer much more in-

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convenience than the man who passed once in a year only, but it would be only in quantity, the quality would be the same. Neither right of access nor any other right of property has been invaded. In the *Fort William* case there was the gravest kind of an obstruction to the right of way, a steam railway line down a city's street, yet the abutting land-owners were not entitled to compensation: see *Hislop v. Township of McGillivray* (1890), 17 S.C.R. 479, and *Ormsby v. Township of Mulmur* (1916), 10 O.W.N. 133, to be reported in these reports.

Then the injury the land-owners complain of, and for which they have been awarded compensation, is really an injury to their business, not their property: it is interference with their "plate glass front" benefits, not their land or any property right connected with it.

The three minor matters complained of: "seepage," smoke and odours, and misconduct of men using these conveniences, are not the subject of compensation, but are, if the land-owners have just cause for complaint, actionable, and the first two might have been, and might be, easily prevented but for the land-owners' objection and obstruction. Compensation is limited to "damages necessarily resulting" from the work. These things could and can be so controlled as to remove all cause for complaint: but the land-owner must act reasonably too. It is his duty to minimise rather than to create and magnify difficulties: to remember that there are generally two sides to every question; and that an impartial investigation would probably shew that the conveniences in question are placed and constructed with more regard for the susceptibilities of the public than those in the land-owners' building are for the susceptibilities of those who use them, and perhaps altogether preferable. And this we should all apply to ourselves if distressed by the notion that we or our neighbours may be the next "victim:" the municipal corporation cannot create nuisances, nor are they at all likely to attempt to do so: I know of no reason why they cannot be trusted to use just as much judgment and care in the placing of these public needs in the public streets as private owners use in placing the like needs in their own houses.

I can find no ground upon which this award can be supported; and so am in favour of allowing the appeal and dismissing the cross-appeal.

RIDDELL, J.:—An appeal from the Official Arbitrator, who awarded the respondents \$10,200 for injury alleged to have been done to them by the corporation exercising their statutory rights.

The facts are simple and not very much in dispute.

The company are the owners of a valuable corner lot and the buildings thereon, which they utilise for a departmental store on a considerable scale. No little advantage, they think, is derived from their plate-glass windows, which attract the foot-passengers—and of course anything which will diminish the foot-traffic will prejudicially affect their business.

In 1913, the city corporation caused the erection of a men's and women's "lavatory," i.e., urinal, opposite this shop. From the dislike of most women—whether reasonable or not, we need not inquire, but undoubtedly existing in this city—to even the sight of such conveniences, the foot-traffic is diminished, the shop is less frequented, and the respondents have suffered in business.

This arises from the establishment of the lavatory itself, and is unavoidable.

Then it is alleged that there is a seepage of water into the respondents' cellar caused by the manner in which the lavatory is built, too near the wall of the building of the respondents, with the space filled with loose earth, &c.

The Act, R.S.O. 1914, ch. 192, sec. 325, gives the right to compensation through such arbitrations as this only "for the damages necessarily resulting" from the exercise of the powers of the municipality—see the cases cited in *Smith v. Township of Eldon* (1907), 9 O.W.R. 963—this seepage did not necessarily result from the city building a lavatory but from the manner in which it was built—e.g., a coat of waterproof cement on the wall of the shop would have prevented any damage of this kind—or, if that could not be done, the lavatory might have been placed further out under the street. Damages for such a cause cannot be claimed under arbitration.

So, too, what was pressed upon us as to smoke and odours—these can be avoided by a stand-pipe sufficiently high, or other means—the alleged nuisance caused by men arranging or disarranging their clothing in the street is not a necessary consequence. A couple of policemen could put a stop to that indecency in short order.

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The arbitrator has found that access to the property is not really interfered with, and I agree with him. An owner of land adjoining a public highway is not, as against the municipality, entitled to access to the highway at every inch of his frontage—he is entitled to reasonable access, and his rights are limited by the necessities of the municipality: *McCarthy v. Village of Oshawa* (1860), 19 U.C.R. 245: *Williams v. City of Portland* (1891), 19 S.C.R. 159: *Donaldson v. Township of Dereham* (1907), 10 O.W.R. 220.

The substantial grievance undoubtedly, in our state of society, does exist and does follow necessarily from the very existence of the lavatory—women will not willingly go where such a structure is near and visible, or the entrance to it is near and visible—and the respondents are without doubt seriously injured.

That, however, is not enough—if the city were to build a more convenient or more attractive street near by, and the crowd which formerly went by the respondents' place, the place knew no more forever, that would be *damnum* indeed, but *damnum absque injuriâ*.

What must be paid under arbitration is damages necessarily resulting from the exercise by the municipality of powers given by the Municipal Act or some special Act—i.e., as I read it, the exercise of powers which a private individual would not have; or, to put it a little differently, the person injured is to receive compensation only if he could have brought an action were it not for the statute giving the powers.

The fee of the highway is in the city: R.S.O. 1914, ch. 192, sec. 433; no doubt subject to the right of all His Majesty's liege subjects, &c., &c., to pass, repass, &c., &c.; and the city can do on its own land anything which any other owner of land can do.

If this were the case of an ordinary adjoining proprietor, what then? It is not what a proprietor of the land thinks a reasonable use which must always be permitted: *Bamford v. Turnley* (1860), 3 B. & S. 62: *Bennett v. Stodgell*, in this Court (1916), ante 45: nor even what a Judge or a jury may consider a reasonable use.

Nor is it always the case that a necessary structure must be tolerated. "*Un tan-house est necessary*," the Court said in *Jones v. Powell* (1629), Palm. 536, 539, "*car tous wear shoes*"—but "*ceo*

poit estre pull down, &c., si est erect al nuisance d'auter"—it may be pulled down, &c., if it is erected to the nuisance of another. However necessary for equally cogent reasons the lavatory may be, that does not entitle it to be erected "*al nuisance d'auter.*"

Nor is it what the complaining proprietors think objectionable—most men would prefer a decent lavatory, adjoining their place, to a millinery shop or a piano-school; most women, to a saloon or a pool-room; and yet these institutions must be tolerated, even though, as some certainly would, they should diminish the value of adjoining property.

It is impossible to be very precise in defining the rights of a land-owner; he is legally entitled to use and occupy his land for any purpose for which it may, in the ordinary and natural course of the enjoyment of land, be used and occupied—and each case must depend on its own facts. The land-owner is not responsible for damage, however natural and however grievous, sustained by others as a consequence of such ordinary and natural user and occupation: Halsbury's Laws of England, vol. 21, p. 525, para. 887.

I cannot see why an owner of land should not, if he sees fit, build a private or a public lavatory on his land—any less than (in the absence of excise and other statutes) he could build a saloon—of course he must guard against such effects as appeared in *Bostock v. North Staffordshire R.W. Co.* (1852), 5 DeG. & Sm. 584, and similar cases. And if, before the statute, a private individual could erect such a structure without fear of an action for damages, I do not see why the city should not—I am not, of course, speaking of an indictment or information at the suit of the Attorney-General for interference with the highway.

The fact that legislation, now R.S.O. 1914, ch. 192, sec. 406 (8), was passed on this subject is, to my mind, not material—this did not modify any common law right, but it enabled the city legally to expend municipal money on the project—avoiding the difficulty in such cases as *Cornwall v. Township of West Nissouri* (1874), 25 U.C.C.P. 9—and also prevented indictment and information.

I think the respondents have no claim enforceable by arbitration; the appeal should be allowed and the award set aside, both with costs.

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LENNOX, J.:—The company are the owners of land on the south-west corner of Queen and Parliament streets in the city of Toronto, having a frontage on Parliament street of 125 feet, and on Queen street of 104 feet. The corner is occupied by a three-storey brick building 40 by 100 feet. The land, it is said, was chosen on account of its special adaptability to the company's requirements and as a promising business centre; and the building was planned and constructed with special reference to the business of the company and the advantageous display and advertisement of their goods. The whole frontage of the building, I think on both streets, is fitted with plate-glass windows extending for two storeys in height.

The city caused lavatories to be constructed beneath the roadway and sidewalk on Parliament street, extending along and within a few feet of the foundation walls of the company's buildings, with two entrances through the sidewalk. There is an iron railing around three sides of these entrances, and the distance from the north side of the one to the south side of the other is 50 feet. On one of the railings is fastened a sign "Men's Lavatory" and on the other "Women's Lavatory." Between the two there stands a shaft called "a breather," carried up about 15 feet above the sidewalk.

Arbitration proceedings have been had under the Municipal Act, the company have been awarded by way of compensation \$10,200, and the arbitrator states: "Of this amount I allow \$9,000 on account of the lavatories as such and \$1,200 for the damage caused by the water."

Both parties have appealed. I will refer only to the city's appeal for the present. The city's notice of appeal is upon the ground that "no portion of the claimants' property having been taken or prejudicially interfered with by the contestants, the contestants say that the claimants are not entitled to recover any compensation from the contestants by reason of the matters referred to in the said award." There is, therefore, no question of quantum raised by this appeal, and counsel for the city restated his position to be that he does not question the amount, but simply takes the position that, no matter what loss the company actually sustain as a matter of fact, they cannot as a matter of law recover anything under the Act, inasmuch as there is no physical inter-

ference with their property, and no part of their property has been taken.

Upon the argument counsel seemed to agree that the rights of the parties are governed by the Municipal Act of 1913, as incorporated in R.S.O. 1914, ch. 192, sec. 406, sub-sec. 8, and sec. 325. The arbitrator seems also to have proceeded on this assumption. If the date when the company gave formal notice, in September, 1913, is what governs, then it is the present Revised Statute that applies; but, if it is the time when the city undertook the work and commenced construction, some time in 1912—and I think this is the determining date—then the governing enactment is the Consolidated Municipal Act of 1903, 3 Edw. VII. ch. 19; and I will quote its provisions. I do not think there is any difference in meaning or effect, but I would prefer to take the later enactment, if I could, as I think the Legislature has made its intention a little more obvious in the Act of 1913 than it was before.

Going back, however, to the Municipal Act of 1903, sec. 552 (1) provides: "The councils of cities or towns may provide and maintain lavatories, urinals and water-closets and like conveniences in situations where they deem such accommodation to be required, either upon the public streets or elsewhere, and may supply the same with water, and may defray the expense thereof and of keeping the same in repair and good order."

By sec. 437: "Every council shall make to the owners or occupants of, or other persons interested in, real property . . . injuriously affected by the exercise of its powers due compensation for any damages . . . necessarily resulting from the exercise of such powers, beyond any advantage which the claimant may derive from the contemplated work; and any claim for such compensation, if not mutually agreed upon, shall be determined by arbitration under this Act."

Assuming that the work has been properly executed, and that the lavatories will be carefully operated and efficiently supervised, it is still not pretended that the simple fact of their being where they are has not and will not injuriously affect and greatly depreciate the value of the company's property for any purpose; indeed, the city's own witnesses have placed the depreciation in value arising from this cause in sums ranging from \$5,500 to \$8,000.

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I have had the advantage of reading the judgment of the Chief Justice and my brother Riddell, and entirely agree in the statement that for improper construction or negligent management the remedy is by indictment or action; but, while entertaining for any opinion expressed by these distinguished and experienced Judges the profoundest respect, I am unable to reach the additional conclusion they have come to, namely, that the owners of property actually and necessarily depreciated in value by, say, the legitimate exercise of statutory powers such as are here conditionally conferred, are not entitled to recover any compensation under them, or that the land is not "injuriously affected" within the meaning of the Municipal Act; nor am I able to see that the admitted necessity of establishing these conveniences in cities and town is any argument for saying that the burden to be borne is to fall, not upon the community whose interest is to be served, but in great measure or mainly upon the unfortunate land-owner whose property adjoins the public convenience.

It is quite true that, if the Legislature authorises the construction of a work, without more—without saying anything about compensation—then the execution of the work, within the meaning of the statute, does not involve the payment of compensation or damages; and this, *where legislative intention is quite clear*, even though it involves the most drastic disregard of private rights, as, for instance, the entry upon the land of citizens or communities. But to have this effect it must be clear that this is what the Legislature intended. Confiscation is a legislative power, and can be delegated, but the delegation of the right to exercise it is not to be presumed; and, although the power conferred may be broad and general in its terms, the absence of any adequate provision for compensation is strong if not almost conclusive evidence that private rights are not to be invaded.

This is all subject, of course, if the language of the statute will admit of it, to the argument of the paramount public interest, of which the English Public Health Act and the Lands Clauses and Railway Clauses Consolidation Acts are notable, and, in the opinion of some eminent Judges, unfortunate, examples. In every case it is a question of construction, and in our own Courts we have very little to guide us in the interpretation of this statute.

In *Hammersmith, etc., R.W. Co. v. Brand*, L.R. 4 H.L. 171,

a case very much relied on by counsel for the city, Lord Chelmsford, at p. 202, said: "The plaintiffs' remedy by action being taken away, the question remains whether they are entitled to receive compensation from the company for the injury done to their house, a question which must be decided entirely by the provisions of the Acts of Parliament relating to the subject. It must be taken as an established fact, that by the use of the railway the plaintiffs' house has been depreciated in value to the extent of £272, and as they cannot recover the damage they have sustained by action, one naturally feels a wish to find that the Legislature has not left them remediless, but has provided for them a means of redress in the shape of compensation to be paid by the company as the price of the right given to them to injure the plaintiffs' property. It is with this disposition that I entered upon the examination of the clauses of the Act to which your Lordships' attention was called in the argument, and I may say that it was with regret I was unable to find anything in them upon which, in my opinion, the claim to the compensation can be established."

The plaintiffs had already recovered all they were entitled to for direct loss occasioned by the construction. The injury in respect of which the £272 was assessed by the jury was for vibration caused by the operation of the railway, and for this they were held, upon the proper construction of the Lands Clauses Consolidation Act and the Railway Clauses Consolidation Act, 1845, not to be entitled to recover.

The feeling to which Lord Chelmsford gave expression as above quoted is the attitude in which I feel impelled to approach the consideration of this award; this, and the conviction that what the Legislature aims at is the imposition of a light burden upon many rather than an intolerable loss upon one person or a few.

In *Metropolitan Board of Works v. McCarthy*, L.R. 7 H.L. 243, Lord O'Hagan, at p. 265, says: "The policy of that Act" (the Lands Clauses Consolidation Act, 1845) "I apprehend to have been to prevent caprice or selfishness from interfering with the promotion of works designed for the public benefit; but to do this with strict regard to individual rights by securing ample compensation in every case in which individual sacrifice or inconvenience is found to be essential to the general good. It never contemplated

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that the community should profit at the expense of a few of its members, and, as the condition of redress, it only required proof by the owner of injury to his property.”

The House of Lords were, as were all the Courts below, unanimously of opinion that the plaintiff was entitled to compensation for the shutting off of easy access to one of his highways, the river Thames, although it did not immediately adjoin his property; following *Chamberlain v. West End of London and Crystal Palace R.W. Co.*, 2 B. & S. 605, and *Beckett v. Midland R.W. Co.* (1867), L.R. 3 C.P. 82.

It is clear, upon the authority of *Re Penny and South Eastern R.W. Co.*, 7 E. & B. 660, *Ricket v. Metropolitan R.W. Co.*, L.R. 2 H.L. 175, *Metropolitan Board of Works v. McCarthy*, *supra*, and other cases, that the Railway Clauses Consolidation Act, or the Lands Clauses Consolidation Act, does not create new rights, but only substitutes compensation for redress which a land-owner, etc., but for the Act, would otherwise have had. If it were material, I would not be at all prepared to say that this is the effect of the Municipal Act. Why should it be? It is not so stated in the statute, nor is it “a necessary implication.” The widest powers of location are conferred upon the council; and, by a judicious exercise of its powers in the matter of selection, it need not often happen that prejudice is occasioned to any one. It is a power coupled with a condition, and the unqualified condition is that if by the exercise of the powers conferred lands are in fact “injuriously affected” due compensation shall be made to owners or occupiers.

Why should I read into the statute a qualification which the Legislature did not introduce? As said by Lord Bramwell in *Cowper Essex v. Local Board for Acton* (1889), 14 App. Cas. 153, in refuting the argument of the Attorney-General, p. 169: “He would read therefore into sec. 49 these words ‘and for which but for these powers hereby given an action would lie.’ I see no reason for this; I think that the words of a statute never should in interpretation be added to or subtracted from without almost a necessity. The Legislature could have added these words if it had thought fit;” and for the purposes of that case—land taken, and other separated land in the same ownership not taken—effect was not given to this contention.

The rule was distinctly dissented from by Lord Westbury in *Ricket v. Metropolitan R.W. Co.*, L.R. 2 H.L. 175. In *Metropolitan Board of Works v. McCarthy*, the Lord Chancellor (Cairns) considered it a somewhat narrow but binding rule as applied to these Acts. We are here, however, breaking new ground, and, as said by Lord O'Hagan in the *McCarthy* case (L.R. 7 H.L. at p. 265): "It appears to me, or it would, as I have said, appear to me if the matter were *res integra*, and unaffected by decision, that wherever there is injury there ought to be compensation, and that the statuatable claim which is now newly established, with new machinery for enforcing it, needs no help from any operation of ancient law."

But, in the view I entertain of this appeal, this is not important. Except for the statute the city corporation could not divert their funds to the purpose of providing or maintaining lavatories; and, aside from the question of money, could not obstruct the highway by a work of this character, however beneficial in a general sense it might be. The diversion of a highway to any purpose except its paramount and primary purpose of a highway is unlawful, constitutes *per se* a common law nuisance, and subjects the municipality to indictment and to an action for damages at the suit of any one sustaining special and peculiar loss or inconvenience. It does not matter at all that the soil and freehold of the streets is now vested in the municipalities. They have always been and are still trustees for them for the public, and for specific limited purposes, that is, for highway purposes alone. See *Town of Sarnia v. Great Western R.W. Co.* (1861), 21 U.C.R. 59.

I know of no case in which the limitation of corporate power in this respect is more clearly defined than in the judgment of Lord Justice Lush in *Vernon v. Vestry of St. James Westminster*, 16 Ch. D. 449 (C.A.), a case in many respects like the present one. It was a case of establishing an urinal upon a highway. It was found to be a nuisance, and the vestry attempted to justify under 18 & 19 Vict. ch. 120, sec. 88, providing that "it shall be lawful for every vestry and district board to provide and maintain urinals, water-closets, privies, and like conveniences in situations where they deem such accommodation to be required, and to supply the same with water, and defray the expense thereof, and any damage occasioned to any person by the erection thereof and the expense of keeping the same in good order, as expenses

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of sewerage are to be defrayed under this Act." The general similarity to our Act is noticeable; but it is also noticeable that the area of selection is confined to lands vested in or controlled by the vestry, and there is no power to expropriate and no provision for compensation such as is provided for by our secs. 437 and 552. At p. 471, the learned Lord Justice says: "What other limitations, if any, the section is to receive, we may, I think, be better able to decide if we consider what was the state of the common law upon this subject before the Act passed. It was well established at common law that an indictment lay against any person or body, whether a vestry, or the trustees of a turnpike road, or a private individual, who obstructed any part of a public highway; and it was not a sufficient defence that the obstruction was for a purpose more beneficial to the public than the use of that part of the road would have been. You could not divert a road so as to get rid of an inconvenient angle. You could not put anything whatever upon the highway, and justify it by saying, 'It does far more good to the public than it does harm.' A telegraph company could not lay a line of posts along a highway without the authority of Parliament." Then the learned Lord Justice refers to a case in which he was engaged at the bar, and proceeds: "I mention that by way of illustration to shew how strict the law was against the occupying by any permanent structure any part of that which had been dedicated to public traffic, however beneficial to the public such structure might be, and whatever collateral advantages might have accrued to the public from it. The situation of the vestry, therefore, but for this 88th section and the other enactments of this Act, was this: They could not have erected any urinal in a public street, and this Act authorises them to do so . . . The vestry are authorised to deprive the public of a portion of their right to traverse every part of the public highway in return for the accommodation which the vestry are authorised to give; and the section is confined to that. The intention is that, as these erections were for the public accommodation, the public right should be infringed to the extent necessary for the affording of that accommodation. . . . It amounts to this, that the vestry are to be authorised to take away from the public, in return for the accommodation which the Act enables them to offer, part of the right which the public enjoyed

at common law of demanding that every foot of a public highway should be kept open for them to pass over."

I need not elaborate this matter; the law is well settled upon it. See, amongst many other cases: *Corporation of Parkdale v. West* (1887), 12 App. Cas. 602; *Regina v. United Kingdom Electric Telegraph Co.* (1862), 31 L.J.M.C. 166, per Crompton, B., at p. 168, referring to what was said by Martin, B.; *Regina v. Mathias* (1861), 2 F. & F. 570; *Rex v. Jones* (1812), 3 Camp. 230; *Original Hartlepool Collieries Co. v. Gibb* (1877), 5 Ch.D. 713; *Rex v. Ward* (1836), 4 A. & E. 384; *Attorney-General v. Cambridge Consumers Gas Co.* (1868), L.R. 6 Eq. 282.

That the company sustained special and peculiar damage "differing in kind" from that, if any, suffered by His Majesty's other subjects, is not open to argument, and was not, I think, disputed. So localised and special is it that the arbitrator finds that the 25 feet of the company's property south on Parliament street not built upon, and the 84 feet on Queen street not built upon, were not "injuriously affected."

That the structure would injuriously affect property opposite it on the east side of Parliament street, is an argument that I can hardly accept. The evidence, as I understand it, and the tendency, I would judge, would be to divert traffic to the other side.

Something beyond mere personal inconvenience or loss, something that affects the property, as a property, and lessens its value, there must be: *Ricket v. Metropolitan R.W. Co.*, *supra*; and, as Lord Chelmsford, in approving the rule proposed by Mr. Thesiger, in *Metropolitan Board of Works v. McCarthy*, *supra*, pointed out "Where the right which the owner of the house is entitled to exercise is one which he possesses in common with the public, there must be something peculiar to the right in its connection with the house to distinguish it from that which is enjoyed by the rest of the world:" L.R. 7 H.L. at p. 256.

These are conditions pointedly and incontestably established by the evidence and findings upon this award. What else is there, assuming that the company must shew a right of action but for the statute? There is the test of Mr. Thesiger, adopted unanimously by the House of Lords in *Metropolitan Board of Works v. McCarthy*, namely: "Where by the construction of

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works authorised by the Legislature there is a physical interference with a right, *whether public or private*, which an owner of a house *is entitled by law to make use of*, in connection with the house, and which *gives it* a marketable value apart from any particular use to which the owner may put it, if the house, by reason of the works, *is diminished in value*, there arises a claim to compensation:" p. 256.

I can find no means of eliminating the company's property from the operation of this rule or declaration of law.

It is well to keep in mind that sec. 437 of the Municipal Act embraces a very wide range of cases: all cases in which the council enters upon, takes, or uses any real property in the exercise of its powers, and all cases in which real property, although not entered upon, taken or used, is "injuriously affected by the exercise of its powers." These powers, not to go beyond the Municipal Act, and only to mention a few of those within it, include the establishment of houses of refuge (sec. 524); inebriate asylums (sec. 529); drainage works and sewerage systems and appointments of commissions to operate them (sec. 554 (1)); cab-stands and sheds and shelters upon the highways (sec. 559); street railways (sec. 569) public slaughter-houses (sec. 586); consumption hospitals (sec. 590a); and, by sec. 552, in part above quoted, a system of public scavenging and for the collection *and disposal* of ashes, refuse, and garbage within the municipality. Here is a comprehensive range of public duties and discretionary powers, their exercise in some cases, perhaps, causing no special or peculiar damage to anybody, and in other cases an almost complete annihilation of values. The effect in each case is a question of fact. They are all covered by one general provision as to compensation.

It is for the council to act with prudence and in good faith, doing as little damage as possible; and where, for the general good, individual injury must result, placing the burden not upon the individual land-owner or occupant, but upon the benefited community.

In this case, and in all cases, so long as that which has been done is what the statute authorises and is done in the statutory way, the remedy for the land-owner whose property is taken or injuriously affected is the same, namely, under sec. 437—now sec.

325 of R.S.O. 1914, ch. 192—and is to be worked out under the arbitration provisions of the Act.

So far as I have read, the principle which should govern the arbitrator in the assessment of damages is nowhere better indicated than in two cases to which I shall now refer.

The first of these is *Cowper Essex v. Local Board for Acton*, 14 App. Cas. 153, in the House of Lords. It was a case under a special Act incorporating the Lands Clauses Consolidation Act, 1845; and I have already referred to cases determining that an owner whose land was not physically interfered with had no right to compensation for injuries resulting from the operation or carrying on of the authorised work after its complete construction. This case determined another point, that when a part of an owner's land is taken, and other land of the same owner, although separated by railways, etc., is "held therewith," and held for the same general purposes, the land-owner is entitled to compensation not only for the land taken, but also to compensation in respect of the separated lands to the extent to which they are injuriously affected by the construction of the work and the use to which they are to be put.

The circumstances of that case and this are widely separated, nor does that case go to shew that the company here are entitled to recover compensation at all—if our Act is to be interpreted as the English Act has been interpreted, they are not entitled to recover—but I am referring to it to shew, assuming that the company are entitled to recover, what should be taken into account in determining the measure of compensation—in other words, the principles underlying compensation.

Resuming, in the *Cowper Essex* case, Lord Watson, at p. 163, said: "Compensation was assessed by a jury, who allowed the appellant £8,737 for the purchase of his interest in the land taken, and also £4,000 for all damage sustained or to be sustained by reason of the injuriously affecting his other lands by the exercise of the respondents' statutory powers. It was admitted on both sides of the bar that the sum of £4,000 was awarded in respect of damage to the appellant's remaining lands, other than those let on building leases. The prospective damage, which the jury took into account in fixing that sum, can only be ascertained from the evidence submitted to them, and the directions given

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them by the under-sheriff in his charge. The inference which I derive from these sources is, that the jury, in estimating compensation for injuriously affecting, were mainly influenced by the consideration that sewage works of the character contemplated by the respondents, though capable of being conducted, and usually conducted, so as not to create any actionable nuisance, are nevertheless, even when so conducted, distasteful to householders, and tend to depreciate the market value of building land in their vicinity, and also that negligence in the conduct of the works may occasionally give rise to actionable nuisance. It therefore appears that a considerable part of the compensation awarded, in one lump sum, by the second finding of the jury, covers damage to arise from the future use of the works for statutory purposes." And at p. 166: "The kind of depreciation which the jury had in view appears to me to be *ejusdem generis* with that arising from traffic upon a public thoroughfare. Neither the use of sewage works, nor such traffic, amounts in itself to a legal nuisance; but the existence of either may alter the character of land in the neighbourhood, and diminish its value in the market. When the erection of sewage works at once diminishes the value of the claimant's other lands to the extent of several thousand pounds sterling, I think he suffers substantial and not imaginary injury, although the depreciation may be due, in a great measure, to an unreasonable antipathy to such works on the part of the purchasing or leasing public."

It is not to the point to argue, as was argued by counsel for the city, in regard to what an adjoining owner might do upon his own land. He could not maintain a nuisance upon it; and, but for the statute, what is complained of here is a public nuisance, causing direct special damage to the company. It is better to deal with the facts as they are, not as they might be, and governed as they would be by entirely different principles; for instance, the clearly pertinent illustration of Lord Watson, of traffic upon a highway built upon the appellant's lands, would have no application here, where no land has been taken. What is to be dealt with here is the statutory authorisation upon an existing highway of that which would otherwise be an actionable nuisance at the suit of the company; and whether, assuming that what has been done, if properly executed, is authorised by the statute, a matter

which I shall directly discuss later on, it is to be done without, or upon payment of, compensation.

Lord Halsbury, L.C. (14 App. Cas. at p. 160) said: "Now I think that the liability of a neighbourhood to such, even occasional and exceptional, annoyances is a real injury to property, and not fanciful or imaginary. It is doubtless attributed to Lord Hardwicke that he once said 'the fears of mankind, though they may be reasonable ones, will not create a nuisance.' But if Lord Hardwicke ever really did say so it is quite clear that that is not now the law, if the fears are assumed to be reasonable. The existence of a large collection of explosive matter in the vicinity of a town has been held to be a nuisance (see *Regina v. Lister* (1857), Dears. & B.C.C. 209, 26 L.J.M.C. 196). The good reason of mankind recognises the fact that occasional negligence is one of the ordinary incidents of human life, and the common law, which embodies the common sense of the nation, proceeds upon common-sense assumptions. I do not think it is any answer to tell people who complain of the establishment of sewage works in their neighbourhood that if and when the sewage works become a nuisance, in the real and proper sense of that word, such works can be restrained by injunction. Land is certainly more marketable when it is free from works of that character than when such works are established, although the neighbours may have the ordinary right of citizens to engage in litigation against such works when they become a nuisance."

Lord Macnaghten (at p. 177) said: "It was said that the objection to a sewage farm comes from an unfounded apprehension of possible mischief. Does that matter? Call it what you will: ignorance, or prejudice, or fancy; the loss to the owner who may want to sell is not the less real. In such a case apprehension of mischief is damage of itself. And the depreciation in value must be the measure of compensation if the owner is to be compensated fairly."

In order to sustain the award it is not necessary to go, and the arbitrator has not gone, the limit of what was determined to be proper upon the facts in the *Cowper Essex* case. The probable consequences of subsequent user may or may not be matters which the arbitrator might have taken into consideration as well. What he has allowed is clearly within the law, namely—assuming that

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the lavatories will be efficiently and carefully managed—the depreciated value consequent upon the establishment of lavatories in immediate proximity to the property and upon its principal highway; the lessened value of the property, as a property, and without reference to the particular purpose for which the company happened to use it, necessarily occasioned by the establishment *per se* of lavatories in its immediate neighbourhood. As far as this, at all events, the arbitrator could properly go, and this is what I understand him to have done.

In a recent expropriation case from New South Wales, *Pastoral Finance Association Limited v. The Minister*, [1914] A.C. 1083, a much broader basis of compensation was sanctioned, but possibly the fact that lands were taken in that case marks a distinction. It is important in considering the principle of compensation here notwithstanding. In it Lord Moulton (at p. 1087) said: “The appellants were clearly entitled to receive compensation based on the value of the land to them. This proposition could not be contested. The land was their property, and, on being disposed of it, the appellants were entitled to receive as compensation the value of the land to them, whatever that might be.” And at p. 1088: “No doubt the suitability of the land for the purpose of their special business affected the value of the land to them, and the prospective savings and additional profits which it could be shewn would probably attend the use of the land in their business furnished material for estimating what was the real value of the land to them. But that is a very different thing from saying that they were entitled to have the capitalised value of those savings and additional profits added to the market value of the land in estimating their compensation. They were only entitled to have them taken into consideration so far as they might fairly be said to increase the value of the land.” I quote particularly for the rule enunciated in this sentence (p. 1088): “Probably the most practical form in which the matter can be put is that they were entitled to that which a prudent man in their position would have been willing to give for the land sooner than fail to obtain it.”

Here no land has been taken, but the principle can yet be readily applied. But, as this is a new Act so far as direct judicial interpretation is concerned, it is well to keep its wording, and, as I think, its obvious intention, in mind, and not hastily conclude that the clear line of demarcation between injury by the con-

struction of the work, and injury resulting from its user or operation, is the effect of our legislation; as it has been determined to be the meaning of many of the Acts *in pari materiâ* of the Imperial Parliament.

Section 552, above quoted, is not mainly or primarily an authority to construct public conveniences, but is a power conferred upon the council to provide *and maintain* lavatories, etc., upon the public streets, *put and keep them in operation*, supply them with water, etc., *and keep them in repair and good order*. This is the power conferred, the power to be exercised, and it is for injurious affection by the exercise of these powers that compensation is to be made. As yet, I have not been able to discover why, in the interpretation of this enactment, the right to obtain fair compensation should be hampered by establishing a line of cleavage between construction and maintenance; aside, of course, from the question of indictable or actionable liability for subsequent negligent operation or control.

Counsel for the city urged, and cited unquestioned authorities to shew, that lavatories and urinals and conveniences of that class are not necessarily nuisances. This is perfectly true. It depends upon the locality. What is an intolerable nuisance in one place may not be a nuisance at all in another.

This leads to an important question not discussed upon the argument of the appeals, that is: has the Legislature authorised the city to "provide and maintain lavatories" at the *locus in quo*, at all? Specifically, of course, it has not; the selection of sites is left to the council; but is there statutory authority for erecting lavatories in a place of this character? The question is directly relevant to the issues here, for one of two results is almost inevitable: that is, that the city have the right to do that which would otherwise be a nuisance, upon payment of compensation; to expropriate the right to commit a nuisance—"the right to injure the plaintiffs' property"—upon payment of compensation, as Lord Chelmsford said in the *Hammersmith* case; or else that the city have not the right, under the statute, to invade the rights of the citizens, to depreciate the value of their properties, albeit that to do so would advantage the community. The law is not obscure upon this question. Wherever it is clear that private rights may be invaded, redress in the shape of compensation is

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to be looked for: *Butterknowle Colliery Co. v. Bishop Auckland Industrial Co-operative Co.*, [1906] A.C. 305; Lord Loreburn, L.C., foot of p. 309; Lord Macnaghten, top of p. 314; Lord Atkinson, pp. 323, 324; *Love v. Bell* (1884), 9 App. Cas. 286.

The exercise of the corporate powers here claimed are permissive only.

In Halsbury's Laws of England, vol. 21, p. 516, para. 870, it is said: "Acts which would otherwise be wrongful may be justified as being authorised by statute. Whether or not the Legislature has authorised interference with private rights depends upon the construction of the statute under which the powers are exercised. The burden of proof of the authority of Parliament to do the act complained of rests upon those who claim the right to do it, and they are bound to shew, with sufficient clearness, that the statute under which they act does take away ordinary private rights.

"871. Statutes which confer a special authority affecting the property and rights of individuals must be construed strictly against the parties to whom the authority is given and in favour of persons affected."

I have already referred to *Vernon v. Vestry of St. James Westminster*, 16 Ch.D. 449, and it would not be unreasonable to infer that our statute, though giving a wider range in the selection of sites for public conveniences, and containing provisions for compensation not found in the English Act, is yet modelled upon the provision of the Imperial Act 18 & 19 Vict. ch. 120, sec. 88, upon which that case was decided. The important point to be made is that, notwithstanding the generality of its provisions it was determined that the vestry had not the right to establish an urinal upon a public highway to the prejudice of the properties adjoining the mews; and the decision turned mainly, if not solely, upon the fact that it contained no adequate provision for compensating the owners of lands injuriously affected. It was held that, while the vestry had a discretionary power in the selection of the site, and had acted in good faith, yet the Court would control their action if they exercised bad judgment or acted unreasonably or so as to occasion a nuisance to the owners of adjoining property; that, but for the provisions of the statute, the vestry had no authority to divert any portion of the highway to anything except

its ordinary use as a highway, and to do so would immediately give a cause of action—by sec. 96, the highways themselves were vested in the vestry boards; that the maintenance of a public urinal upon private property would itself be a nuisance which the Courts would restrain (see judgment of Lord Justice James, in appeal, at p. 466, hereafter quoted); that the provisions of the Act authorising the vestry to erect urinals did not empower them to erect one *where it would be a nuisance* to the owners of adjoining property, there being no words in the Act which expressly or by necessary implication authorised them to create a nuisance.

The case is so illuminating that I am tempted to quote from it. At p. 459, Malins, V.-C., said: "But great as the powers of vestries under the Act are, they are not absolute, and vestries are, like all other public bodies, liable to be controlled by this Court if they proceed to exercise their powers in an unreasonable manner, whether they are induced to do so by improper motives or from error of judgment. This is clear also from the case already cited of *Biddulph v. St. George's Vestry*, 3 D.J. & S. 493, 500, where the Court of Appeal held it to depend upon the question whether the vestry were exercising their powers in a reasonable manner."

At pp. 460-461, the Vice-Chancellor quotes Lord Justice Turner as saying in the *Biddulph* case: "It is said that if the powers be as extensive as contended for on the part of the defendants they might erect an urinal in front of any gentleman's house." (The city claim the right to do this, and without compensation.) "The answer to that is, that such a proceeding could not possibly be held a *bonâ fide* exercise of the powers given by statute."

The Vice-Chancellor, at p. 461, proceeds: "In the present case, the plan is to place the urinal within a few feet of the back door of Mr. Thorne's house, and, notwithstanding the zealous testimony of the vestrymen and others who were examined, I am of opinion that such proximity must necessarily create a nuisance of a most disagreeable character. . . . The proposed urinal is therefore, in my opinion, calculated to cause an intolerable nuisance to the plaintiff Thorne . . . Therefore, taking all these circumstances into consideration, I am of opinion that the defendants ought not to be allowed to place the urinal where they propose to place it, and that the plaintiffs are consequently entitled to the injunction they ask."

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In the Court of Appeal, Lord Justice James said (p. 466): "If the erection in question were made by a private land-owner on his own soil and freehold, it would seem to be beyond all question a nuisance so grave and so serious that the neighbours would be entitled to apply to the Court for an injunction to restrain it." There is nothing in the case to indicate that the work would not be well and carefully executed, or that the service would not be properly and prudently managed. The case proceeds upon the assumption, as is shewn to be the fact here, that the establishment of an urinal *in that place* would lessen the comfort and convenience of owners of properties in the neighbourhood, and *per se* constitute a nuisance. The Lord Justice proceeds: "There are no words here that authorise the vestry to commit a nuisance. *Primâ facie* nobody is authorised to commit a nuisance, and nobody is to be held so authorised under an Act of Parliament unless it appears from express words or by necessary implication that the act was to be done or might be done notwithstanding its tending to the creation of a nuisance . . . If private rights are to be interfered with, they must be interfered with by express legislation, and I am of opinion that there is no legislation in this case authorising the vestry, though they may be called a local parliament, to interfere with those private rights."

As I have said, there may be a right to commit a nuisance "by necessary implication" if a liability to make full compensation is provided for by the Act. Compensation is then substituted for complete enjoyment. Referring to this, Lord Justice James says (p. 467): "It is said that any damage sustained would be compensated for under the clause for compensation, but I am of opinion that clause does not apply to such a case as this."

After referring to sec. 88 and stating that the statute does not contemplate the expropriation of the right to commit a nuisance—a right which I think our statute may confer, if the municipality see fit to exercise it upon the statutory terms imposed—the learned Lord Justice sums up: "I am of opinion, therefore, that the vestry had just the same power as the trustees of the estate would have had if the settlement under which they acted had contained a similar power, and that they could no more under colour of this provision make an erection to the nuisance of the neighbours, than the owners of the estate themselves could have

done if they had been minded to erect such conveniences upon their own property for the convenience of the public. In my opinion the vestry have exceeded their authority in doing that which, in my opinion, is a nuisance to the neighbourhood."

I have already quoted from the judgment of Lord Justice Lush in this case as to the use of highways. After dealing with this question he continues (p. 472): "That, in my judgment, is the true scope of the Act, and the extent of the enactment, therefore, is to authorise the erection of these conveniences upon a public thoroughfare and highway, when public rights only would be interfered with, not necessarily in every place which is public—every court, or alley, or passage—but in places where, but for the statutory powers, the erection of them would have been an obstruction to the public highway, and an indictable offence. . . . There is nothing whatever in the section to suggest that it authorises interference with any private right."

After pointing out that no private right is to be invaded, as no compensation is provided for, the learned Lord Justice concluded (p. 473): "The result, therefore, is that the 88th section authorises the Board to take away so much of the public right of transit as they had before in highways and in streets, in return for accommodation which the Act authorises them to give, and which this structure presumably does give. That is the whole extent of the statutory power, and therefore in putting up the erection in this spot, though it is a public place, they have exceeded their powers, because it injuriously affects private rights."

It would better accord with the views I entertain as a matter of technical exactness to reduce the award to \$9,000, leaving the company to sue for the \$1,200 as damages. Counsel for the city does not ask for this. Financially speaking, there could be no gain to the city if this were done, and there is a great deal in what my brother Masten says upon this point. In the circumstances, with some little hesitation, I adopt his judgment upon this question. I would have been at least as well pleased if the arbitrator had allowed something for depreciation in respect of the 25 feet not built upon on Parliament street, but I cannot say that he erred as to this. Enough has not been shewn to convince me that the award should be increased. The cross-appeal should be dismissed with costs.

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I am of opinion that the award should stand.

(1) That, but for the statute, what the Council of the City of Toronto has done would be an unlawful obstruction of the highway, a common law nuisance and an indictable offence.

(2) That, by reason of what has been done, the claimants have suffered financial injury differing in kind and extent from the injury and inconvenience occasioned to others; and but for the statute would have a cause of action against the city.

(3) That the statute gives the company an absolute right to compensation, to the extent to which their property is injuriously affected, without shewing a common law right of action—that the right of the city to injure the company's property is conditional upon making compensation.

(4) And that the assumption that fair compensation is to be made for injury to property affected is the only basis upon which it can reasonably be inferred that the city had the right to exercise their powers to the prejudice of owners or occupiers of properties; and, if otherwise, the statute conferred no power to execute the work where it has been executed, and the city could have been, and can be, restrained by injunction.

The city's appeal should be dismissed with costs.

MASTEN, J.:—Appeal by the City of Toronto from the award of P. H. Drayton, K.C., Official Referee, whereby he gave to the respondents, the J. F. Brown Company Limited, damages of \$10,200 for the injurious effect upon their land caused by the construction by the appellant corporation of public conveniences under and on Parliament street adjacent to the respondents' premises. These premises are situate at the south-west corner of Queen and Parliament streets, in the city of Toronto, and extend along Parliament street 120 feet.

On the premises is erected a three-storey brick building, adapted to the sale of goods to the public at retail, which building extends from the corner southerly 100 feet along Parliament street.

In the year 1913, the Corporation of the City of Toronto erected in Parliament street, on and under the sidewalk, on the west side of the street adjacent to the respondents' premises, a lavatory for men and a lavatory for women, with necessary and proper appurtenances. The structures, with entrances, occupy in length

some 50 feet of the sidewalk on the west side of the highway, with a width at the street surface of some 5 or 6 feet. The conveniences are further described in the judgment of the learned Referee as follows: "At the time this proceeding was brought, there were three structures standing up in the sidewalk, that is, a man's entrance at the north, a woman's entrance on the south, and what has been called a 'breather' in the centre, all some 15 feet high. During the pendency of this proceeding, the city, with a view of meeting some of the objections brought forward by the claimants, removed the canopies at each end, leaving only an iron railing protecting the steps leading down to the lavatories, the breather in the centre remaining as formerly, and this is the present state of affairs in respect to the physical aspect of the lavatories."

This description, coupled with the depositions of the witnesses and the exhibits, makes it abundantly plain, in my opinion, that the structures in question are of such a nature and so situate on the highway as to hinder and prevent the public from passing along it as freely, safely, and conveniently as heretofore.

Counsel for the appellants, the Corporation of the City of Toronto, expressly stated that he was not appealing in respect to the quantum of the award, but solely on the question of legal liability, alleging that nothing at all should have been awarded. The notice of appeal reads as follows: "No portion of the claimants' property having been taken or physically interfered with by the contestants, the contestants say that the claimants are not entitled to recover any compensation from the contestants by reason of the matters referred to in the said award."

And, in the written memorandum handed in, he bases his contentions on the following grounds:—

"(1) That the damage or loss must be such as would have been actionable but for statutory powers.

"(2) That the damage must be occasioned by the construction of the authorised works, and not by their user.

"(3) That a public lavatory is not of necessity a nuisance."

I therefore deal with the appeal of the Corporation of Toronto from the standpoint of legal liability only.

In approaching this case, the Court should, I think, be influenced by the consideration that, unless it clearly appears that

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the Legislature intended to authorise the municipal corporation to do that which injuriously affects private property, without paying or requiring the payment of compensation, such intention will not be inferred: *Commissioner of Public Works (Cape Colony) v. Logan*, [1903] A.C. 355: *Western Counties R.W. Co. v. Windsor and Annapolis R.W. Co.* (1882), 7 App. Cas. 178.

In the case of *Regina v. St. Luke's Vestry*, L.R. 7 Q.B. 148, at p. 153, Kelly, C.B., says: "I cannot but observe in a case like this, that, wherever it appears that the case is one in which it is plain that very serious injury may have been done to the premises of the party claiming compensation, I think that we must put a liberal construction on the Acts of Parliament before us in determining the points raised. Unless it is perfectly clear that the language of the different Acts is not sufficiently ample or extensive to embrace the case in question, we ought to hold that a party whose property is injuriously affected, and to a very great extent, by the operation of a public body, shall be entitled in a court of law to compensation."

The power of municipal corporations to construct public avatories is to be found in sec. 406, clause 8, of the Municipal Act, R.S.O. 1914, ch. 192, and the right of the respondents to compensation is claimed under sec. 325 of the same Act, which reads as follows:—

"325.—(1) Where land is expropriated for the purpose of a corporation, or is injuriously affected by the exercise of any of the powers of a corporation or of the council thereof, under the authority of this Act or under the authority of any general or special Act, unless it is otherwise expressly provided by such general or special Act, the corporation shall make due compensation to the owner for the land expropriated, or where it is injuriously affected by the exercise of such powers for the damages necessarily resulting therefrom, beyond any disadvantage which the owner may derive from any work, for the purposes of, or in connection with which the land is injuriously affected.

"(2) The amount of the compensation, if not mutually agreed upon, shall be determined by arbitration.

"(3) Where fencing or additional fencing will become necessary, owing to land having been expropriated, the cost of it shall be included in the compensation.

"(4) Where part only of the land of an owner is expropriated, there shall be included in the compensation a sum sufficient to compensate him for any damages directly resulting from severance."

I have compared these sections with the provisions which were previously in force, and I cannot find that the powers conferred by these sections differ in substance from the powers conferred by the statutes which preceded them.

Numerous cases of compensation for land injuriously affected have arisen in England under the Lands Clauses Consolidation Act, the Railways Consolidation Act, the Waterworks Clauses Act, the Public Health Act, the Local Government Act, and other similar Acts. In this country, similar questions have frequently arisen, under the Railways Acts, Dominion and Provincial, as well as under the Municipal Acts of the various Provinces. While the phraseology of these Acts differs somewhat in detail, yet the leading principles of the law of compensation, which assumed definite form in England many years ago, have, so far as I can ascertain, been uniformly applied to them all, including the Municipal Act of Ontario, under which this case falls to be dealt with. The matter is touched upon by Mr. Justice Osler in the case of *In re Leak and City of Toronto* (1899), 26 A.R. 351, at p. 356, where, in speaking of the provisions for the expropriation of land contained in the Municipal Act then in force, he says: "The principles upon which compensation is to be assessed under this section seem to me not different from those applied under the English Act, except when the contrary is expressly provided, as for example in setting off advantage, etc."

In dealing with the subject under the Acts above mentioned, certain legal principles in relation to them have been clearly established and are now beyond controversy.

These have been stated in various terms, but for convenience I quote the summary set forth in Cripps on Compensation, 4th ed., p. 123:—

"When no land has been taken the words 'injuriously affected' or words of similar import are limited to loss or damage under the following heads:

"1. The damage or loss must result from an act made lawful by the statutory powers of the promoters.

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"2. The damage or loss must have been such as would have been actionable but for the statutory powers.

"3. The damage or loss must be an injury to lands and not a personal injury or an injury to trade.

"4. The damage or loss must be occasioned by the construction of the authorised works and not by their user."

These principles are not in controversy, and are accepted, as I understand it, by both parties to this present litigation. But it is alleged on behalf of the appellants, the Corporation of the City of Toronto, that this case raises certain new and different questions not covered by the principles above stated nor by any decided case, and the contention so put forth is presented in different forms:—

(1) That the Municipal Act having, by sec. 433, conferred upon the municipality the freehold in the highway, the municipality is free to exercise over highways so vested in it the same power and authority and to deal in all respects with them in the same way as though the highway was private real estate of an individual. So that, whatever a private owner might with impunity do upon his own lands, a corporation may do upon the highway, without any compensation being payable to adjoining owners.

(2) That a new right, viz., the right to construct lavatories in, on, or under streets has been conferred by the Legislature on municipalities, without any provision for compensation to persons whose lands are injuriously affected, and consequently that no right to compensation exists.

A consideration of the question and a perusal of the cases have led me to the conclusion that this is an overstatement of the powers of the municipality, and that the rights of compensation in favour of private owners whose lands are prejudicially affected are not limited to the extent indicated in the contention of the appellants. In order to reach a conclusion on the questions arising in this case, I have considered and digested a few of the numerous decisions which seem to me to bear most closely upon the questions here submitted for consideration, with the view of ascertaining the state of the law in relation to highways prior to the legislation above mentioned.

The case of *Regina v. United Kingdom Electric Telegraph Co.*,

31 L.J.M.C. 166, was an indictment for a nuisance, brought against the defendants for erecting, and placing on the highway, posts, with wires fastened to both sides of the posts, and so obstructing the highway. A verdict having been entered against the defendants, a motion was made for a new trial before the Court of Queen's Bench (consisting of Crompton, J., and Blackburn, J.) Martin, J., at the trial, had ruled that "in the case of an ordinary highway, although it may be of a varying and unequal width, running between fences, one on each side, the right of passage or way, *primâ facie*, and unless there be evidence to the contrary, extends to the whole space between the fences; and the public are entitled to the use of the entire of it as the highway, and are not confined to the part which may be metalled or kept in order for the more convenient use of carriages and foot-passengers." This direction being moved against, the Court held it to be a very proper direction, and declared that "the first direction, therefore, is correct, and in point of fact is little more than saying what was said in the authorities referred to and in others, that the public have a right of passage over the whole highway." Crompton, J., then continues: "The second proposition is a larger one, and we have to see whether there is any misdirection in that. It is 'that a permanent obstruction erected on a highway, placed there without lawful authority, which renders the way less commodious than before to the public, is an unlawful act and a public nuisance at common law; and that if the jury believed that the defendants placed for the purposes of profit to themselves, posts with the object and intention of keeping them permanently there in order to make a telegraphic communication between distant places, and did permanently keep them there, and the posts were of such size and dimensions and solidity as to obstruct and prevent the passage of carriages and horses or foot-passengers upon the parts of the highway where they stood, the jury ought to find the defendants guilty upon this indictment; and that the circumstances that the posts were not placed upon the hard or metalled part of the highway, or upon a footpath artificially formed upon it, or that the jury might think that sufficient space for the public traffic remained, are immaterial circumstances as regards the legal right, and do not affect the right of the Crown to the verdict.' That appears to us to be substantially a proper direction, because, in effect, it comes to this, whether there was a practical obstruc-

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tion to the public using the highway. All the cases cited by Mr. O'Malley really come to that; and it was so explained in the case of *The Queen v. Russell* (1854), 3 E. & B. 942, that what was there called a mathematical obstruction, as was said, I think by myself, as where children build erections upon the sand, would be an obstruction, but not a practical one . . . Where there is a practical obstruction, as I understand my brother Martin to put it, on a part of a highway by which the public are prevented from using it, that is clearly a nuisance according to all the definitions of the word. The learned Judge was also right in saying that . . . it does not make any difference that the jury hold that sufficient space was left." Blackburn, J., agreed in the judgment, and I find no subsequent case casting any doubt upon the law as there laid down.

The case of *Regina v. Train* (1862), 31 L.J. M.C. 169, was an indictment against a tramway company, and it was held that the tramway was a nuisance, being an obstruction of the ordinary use of the highway for carriages and horses, and that it rendered the highway unsafe and inconvenient in a substantial degree. In that case the defendants sought to avoid a conviction on the ground that what was done was a reasonable re-arrangement of the highway for the convenience of the public generally using that highway, and for the accommodation of the traffic passing over it. In other words, that there was such a benefit to a large number of persons who would use the tramway as a mode of communication that, taking it altogether, it ought not to be considered a nuisance, and evidence was tendered to establish that contention. In refusing to concede the relevancy of this evidence, Mr. Justice Blackburn says (p. 173): "The evidence . . . proposed to be put in . . . was . . . to shew that this tramroad was not made for carriages which had been previously in use, but with the intention of using a new and substituted mode of carrying on the traffic in a way which it was said would be highly beneficial to the public. *If that were the fact, and if it would really be beneficial to the public, I think that still the matter would be a nuisance as it exists at present;*" and the conviction was sustained.

The case of *Vernon v. Vestry of St. James Westminster*, 16 Ch.D. 449, is instructive. It was a case by the trustees under the

will of one Pollen and others to restrain the Vestry of the Parish of St. James, Westminster, from erecting a public urinal in certain mews, situate in the parish. At p. 471, Lord Justice Lush, in discussing what was the state of the common law before the Act in question was passed, says: "It was well established at common law that an indictment lay against any person or body, whether a vestry, or the trustees of a turnpike road, or a private individual, who obstructed any part of a public highway; and it was not a sufficient defence that the obstruction was for a purpose more beneficial to the public than the use of that part of the road would have been. You could not divert a road so as to get rid of an inconvenient angle. You could not put anything whatever upon the highway, and justify it by saying, 'It does far more good to the public than it does harm.' A telegraph company could not lay a line of posts along a public highway without the authority of Parliament." And, after dealing with an unreported case in which he had been engaged as counsel, he says: "I mention that by way of illustration to shew how strict the law was against the occupying by any permanent structure any part of that which had been dedicated to public traffic, however beneficial to the public such structure might be, and whatever collateral advantages might have accrued to the public from it. The situation of the vestry, therefore, but for this 88th section and the other enactments of this Act, was this: They could not have erected any urinal in a public street, and this Act authorises them to do so. There are other provisions of the same kind in the Act. Thus there is an express power (sec. 130) to erect lamp-posts anywhere they like in a public highway. . . . Then the 108th section, which I believe has turned out very useful, authorises them to place what are called refuges in the middle of a road. Another clause authorises drinking fountains. That they could not do without the authority of Parliament. I think that these considerations afford a key to the construction of this clause, and suggest to us what its true limitation is. The vestry are authorised to deprive the public of a portion of their right to traverse every part of the public highway in return for the accommodation which the vestry are authorised to give; and the section is confined to that. The intention is that, as these erections were for the public accommodation, the public right should be infringed to the extent necessary for the affording of that accommodation.

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That, in my judgment, is the true scope of the Act, and the extent of the enactment, therefore, is to authorise the erection of these conveniences upon a public thoroughfare and highway, when public rights only would be interfered with, not necessarily in every place which is public—every court, or alley, or passage—but in places where, but for the statutory powers, the erection of them would have been an obstruction to the public highway, and an indictable offence. . . . It amounts to this, that the vestry are to be authorised to take away from the public, in return for the accommodation which the Act enables them to offer, part of the right which the public enjoyed at common law of demanding that every foot of a public highway should be kept open for them to pass over.”

Corporation of Parkdale v. West, 12 App. Cas. 602, further illustrates the principle that any interference with a highway is wrongful unless done in pursuance of statutory authority. In that case the defendants the Corporation of Parkdale were held liable (not having acted under any statutory authority) as wrongdoers, for their disturbance of Queen street, Toronto, and in concluding his judgment Lord Macnaghten said, at p. 616: “Their Lordships were asked by the appellants to express an opinion as to the measure of damages in case the appeal should be dismissed. It appears to their Lordships that as the injury committed is complete and of a permanent character, the respondents are entitled to compensation to the full extent of the injury inflicted.”

Corporation of Parkdale v. West was followed, and the same principle applied, in the case of *North Shore R.W. Co. v. Pion* (1889), 14 App. Cas. 612, which was an interference with access to navigable waters. The interference was held wrongful, and damages awarded.

The foregoing cases are not in any way impugned or overruled by the decision in the case of *Rex v. Bartholomew*, [1908] 1 K.B. 554. In that case the verdict was clearly ambiguous and the prosecution had no “merits.” Lord Alverstone, C.J., in beginning his judgment says: “This case comes before us in an unsatisfactory way, and in a form which will prevent us from laying down any ruling which will be of any service in any subsequent case.” At p. 561 he says: “The finding of the jury, unexplained, seems to me to be open to the construction suggested by the defendant’s

counsel that it amounted to a finding that there was no appreciable obstruction to any person who desired to go along or across the street. If that be the real meaning, it would not be proper for the Judge to enter a verdict of guilty."

In this view, it does not appear that that decision has laid down any new law or infringed upon the principles previously established.

In *Campbell v. Paddington Corporation*, [1911] 1 K.B. 869, Avory, J., at p. 876, says: "As the wrongful act of the defendants" (in making an erection in the highway) "constituted a public nuisance, the plaintiff, having in my opinion established the fact that she has sustained special damage over and above the general public inconvenience, has established a cause of action on this ground also."

In the case of *In re Tate and City of Toronto* (1905), 10 O.L.R. 651, the city corporation, in the exercise of its powers, closed a street called Herrick street, which ran from the east side of Manning avenue in an easterly direction to and across Bathurst street, the starting-point on Manning avenue being directly opposite the claimant's house. The claimant could, without using Herrick street, reach Bathurst street by going a comparatively short distance either north or south on Manning avenue from his house to other cross-streets. The Official Arbitrator held that the closing of Herrick street injuriously affected the value of the claimant's house, and awarded him \$200 damages. The actual access of the claimant to Manning avenue was not in any way prejudiced or affected, but the convenience of his access to Bathurst street was lessened, and the distance which he had to travel to get there increased. The Official Arbitrator awarded the claimant \$200 damages, and the Court of Appeal sustained the award, on the principle laid down in *Metropolitan Board of Works v. McCarthy*, L.R. 7 H.L. 243.

The case of *In re Tate and City of Toronto* (above referred to) was followed by Sir William Mulock in *Re Taylor and Village of Belle River* (1910), 15 O.W.R. 733, 2 O.W.N. 609, and the same principle of decision was adopted and confirmed by the Court of Appeal in *Re Neal and Town of Port Hope* (1914), 7 O.W.N. 264. The most recent case in our own Courts applying the same principle is *Chadwick v. City of Toronto* (1914), 32 O.L.R. 111.

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The cases last mentioned are not the result of an artificial or limited rule that the stopping or lessening of access to a highway gives a right of compensation, while other injurious effect does not do so. Rather, it seems to me, they are applications of the general principle that wherever the action of the municipality would, but for the statute, be wrongful, and the claimant suffers special damage to his lands, compensation will be awarded.

I also refer to *Rex v. Ward* (1836), 4 A. & E. 384; *Chamberlain v. West End of London and Crystal Palace R.W. Co.*, 2 B. & S. 605; *Beckett v. Midland R.W. Co.*, L.R. 3 C.P. 82, at p. 99; *Wadham v. North Eastern R.W. Co.* (1884-5), 14 Q.B.D. 747, 16 Q.B.D. 227; and *Ogston v. Aberdeen District Tramways Co.*, [1897] A.C. 111—as illustrating the principle here applicable.

But it is said that the legal rights of the municipal corporation have been so extended by sec. 433 of the Municipal Act that the appellants are now, as respects a highway, in the same position and endowed with the same rights as a private individual enjoys in lands owned by him in fee simple, and that the appellants are in the same legal position with respect to these constructions as if they had acquired the lot lying south or the lot lying west of the respondents' lands, and had constructed these lavatories on the lot so acquired. I am unable to agree in this view.

Section 433 of the Municipal Act is as follows: "Unless otherwise expressly provided, the soil and freehold of every highway shall be vested in the corporation or corporations of the municipality or municipalities, the council or councils of which for the time being have jurisdiction over it under the provisions of this Act."

This provision was first enacted in the same words in 3 & 4 Géo. V. ch. 43, as sec. 433. Prior to that time, the governing enactments were, 3 Edw. VII. ch. 19, secs. 599 and 601, which are as follows:—

"599. Unless otherwise provided for, the soil and freehold of every highway or road altered, amended or laid out according to law, and every road allowance reserved under original survey along the bank of any stream or the shore of any lake or other water, shall be vested in His Majesty, His Heirs and Successors."

"601. Every public road, street, bridge or other highway, in a city, township, town or village,—except any concession or other

road therein, which has been taken and held possession of by any person in lieu of a street, road or highway laid out by him without compensation therefor,—shall be vested in the municipality, subject to any rights in the soil reserved by the person who laid out such road, street, bridge or highway.”

In England the effect of the statutory provisions is to vest in the municipal authority the property in the surface of the street or road and in so much of the actual soil below and air above as may reasonably be required for its control, protection, and maintenance as a highway for the use of the public, and to this extent the former owner is divested of his property. But neither here nor in England, during all the years that the local authorities have owned the surface, has it ever been held that such municipal ownership in the highway is an absolute beneficial ownership, identical with the rights of private ownership. On the contrary, it was said by McLean, J., in *Town of Sarnia v. Great Western R.W. Co.* (1861), 21 U.C.R. 59, at p. 62, that the property thus vested in the municipalities “is a qualified property, to be held and exercised for the benefit of the whole body of a corporation. . . . They so far may be said to hold the freehold, but . . . it is only as trustees for the public.” See also the remarks of Lord Fitzgerald to the like effect in *Chavigny de la Chevrotière v. City of Montreal* (1886), 12 App. Cas. 149, at p. 159.

It has at no time been suggested that the Act has absolved from indictment for nuisance municipal corporations liable for the repair and maintenance of highways, and who fail in that duty.

A consideration of the sections of the Municipal Act relating to highways (429-486) confirms the view that the municipal corporation are trustees for all the King’s subjects of the highway so vested in them, and that it remains the right of all such subjects to pass over the highway without obstruction, and that this right is paramount, and cannot be infringed, even by the municipal authority itself, except under express statutory powers.

I refer particularly to secs. 459, 472, 473, and 491 of the Municipal Act.

The right of the public to free passage over a highway is, as I understand the law, substantially identical in principle with the right of the public to uninterrupted passage over navigable waters.

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It was originally held in *Original Hartlepool Collieries Co. v. Gibb*, 5 Ch.D. 713, that a navigable river is a public highway navigable by all His Majesty's subjects in a reasonable way and for a reasonable purpose, and the public right of free passage extends to the whole of the navigable channel, which the public are entitled to use as a highway whenever it suits their convenience. In *Foreman v. Free Fishers and Dredgers of Whitstable* (1869), L.R. 4 H.L. 266, it was held that the right of navigation is paramount to the right of property of the Crown and its grantees in the bed of the river, and such property cannot be used in any way so as to derogate from or interfere with the public right of navigation.

In the case of *Parmeter v. Attorney-General* (1822), 10 Price 412, it was determined that any grant by the Crown which interferes with the public right is void as to such parts as are open to such objection, if acted upon so as to effect a nuisance by working injury to the public right; and in the case of *Rex v. Montague* (1825), 4 B. & C. 598, it was held that the public right in navigable waters can only be abridged by Act of Parliament or by writ *ad quod damnum*, followed by an inquisition, or by natural causes such as recession of the sea, or the accumulation of soil and mud.

The principles so established with respect to navigable waters appear to me to apply equally to highways. Applying them to the facts now before us, I think that the Ontario statute vesting the freehold of highways in the municipal corporation does not confer on such municipal corporation any jurisdiction or power to interfere with the paramount right of the public to uninterrupted and unimpeded passage over such highways.

Lastly, it is said that the Legislature has conferred on municipal corporations a new right, namely, that of erecting lavatories in the public highways, without making any provisions for compensation for the injuries inflicted on neighbouring premises, and therefore that the respondents have suffered *damnum sine injuriâ*. But, in my opinion, the terms of sec. 325 of the Municipal Act are such as to preclude the possibility of giving effect to any such argument. That section provides that, where land is injuriously affected by the exercise of any of the powers of a corporation under the authority of this Act, the corporation shall make due compensation to the owner for the land expropriated, or where it is injuriously affected by the exercise of such powers,

for the damages necessarily resulting therefrom. Those words are manifestly applicable to the power conferred on municipal corporations by the Municipal Act itself to erect lavatories in public highways.

The principles laid down in the foregoing authorities make it plain that at common law, and apart from the statutory authority, structures such as those in question would constitute a nuisance for which the appellant corporation would be liable to indictment; also that it would be no defence to an indictment for such nuisance to shew that, although these structures constitute a nuisance to the highway, yet in other respects they are beneficial to the public; and further that it would not be a defence to shew that, though a part of the highway actually used by passengers is obstructed, sufficient available space is left to serve the requirements of traffic. If, in addition, I am right in the view taken above of the effect of secs. 325, 406, sub-sec. 8, and 433 of our Municipal Act, this appeal is reduced to very narrow limits, because the respondents have undoubtedly suffered particular and special damage, differing in quality and extent from any general inconvenience suffered by the public who use the highway.

It appears from the evidence that the selling value of the respondents' lands and buildings has been depreciated by the erection of these lavatories. I refer to the evidence of the experts called for the appellants, as follows:—

Mr. Ponton, at p. 136, question 17, estimates the depreciation in the respondents' property at \$8,000; Mr. Poucher, at p. 166, question 42, gives his estimate as \$8,000. Mr. Fielding, at p. 193, question 17, makes the depreciation \$6,700; and Mr. Walker, at p. 287, question 12, makes it \$5,500. Needless to say, the experts for the respondents (claimants) estimate the depreciation at much higher figures. The witnesses are therefore unanimous that there has resulted to this property, from the act of the appellants, damages of an appreciable and extensive character.

The result is that, but for the statute, the respondents would have been entitled to maintain an action for the damages so occasioned to their lands by the appellants: *Chamberlain v. West End of London and Crystal Palace R.W. Co.*, 2 B. & S. 605, 617; *Beckett v. Midland R.W. Co.*, L.R. 3 C.P. 82; *Metropolitan Board of Works v. McCarthy*, L.R. 7 H.L. 243; *Caledonian R.W. Co. v.*

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Walker's Trustees (1882), 7 App. Cas. 259; *Regina v. Malcolm* (1891), 2 Can. Ex. C.R. 357.

Where the lands of the respondents have been so seriously and permanently depreciated in value, it seems to me idle to say that the respondents have not been injuriously affected by the erection of these lavatories; and the fact that the injury is done by a municipal authority acting in the general interest of the community, and not by a tramway or other company operated for its own gain, makes no difference in the rights of the person whose property is injuriously affected. The statutes have provided in the same way in both cases that the person so injuriously affected shall receive compensation.

For these reasons, it appears to me that the claim comes within the provisions of sec. 437 of the Municipal Act, and that the respondents are entitled to the compensation which has been awarded them by the arbitrator.

My conclusions, therefore, are: that the appellants, having erected the construction in question on a public highway, and having thereby lessened the present selling value of the respondents' lands, have subjected themselves to liability for compensation; that, in so doing, they are not in the same legal position as if they had erected these lavatories on lands which did not form a part of a public highway; and the fact that the freehold of the highway is vested in the appellants does not, in my opinion, affect these conclusions.

I should add that, in the view which I have taken of this matter, I have not overlooked the several subordinate claims for damages put forward by the respondents: (1) interference with access; (2) nuisance from smells and smoke; (3) damage from seepage of water.

Evidence regarding them was properly received and considered in estimating the quantum of damage, and I do not wish to suggest that each of them might not found a legal claim. But, in discussing the question of legal liability, these three phases of the question seem to me to be incidental and collateral to the broader basis of liability indicated above. The appellants have done an act which, but for the statute, would be illegal. That illegal act has lessened the value of the respondents' lands—it matters not whether by destroying access, by seepage, by smoke and smell,

or by what cause soever. The only relevant consideration is that, whatever be the means, the appellants have injuriously affected the respondents' land.

Two further questions arising under the appeal of the city corporation remain to be considered:—

(1) Are the damages (\$1,200) allowed by the arbitrator in respect of "seepage," damages caused by negligence and not such as necessarily arise out of the acts of the appellants?

(2) Is the claim of the respondents unenforceable because the "access" to their premises is not substantially interfered with?

As I have already indicated, it appears to me that both these questions are merged in the broader question already dealt with, namely, has the marketable value of the lands in question been lessened by the construction of these lavatories? But, in case that view is not maintained, it may be well to state the opinion which I entertain regarding these two questions.

On the first question it has been determined that compensation is granted only for that which is done under the Act. For wrongs done outside the Act, the common law right of action exists and must be resorted to: *Imperial Gas Light and Coke Co. v. Broadbent* (1859), 7 H.L.C. 600, at p. 612.

The damages for which compensation is given must be such as necessarily result from the exercise of the powers of the corporation, and therefore are not such as arise from negligence in doing the work: *per* Osler, J.A., in *McGarvey v. Town of Strathroy* (1885), 10 A.R. 631, at p. 638.

This law is clear and unquestioned; but, in my opinion, it does not apply to the facts of this case. If the municipal corporation adopt a reasonable scheme and carry it out, persons injuriously affected are entitled to compensation in the amount of damages necessarily resulting from the work so done, even if the municipal corporation by doing the work in a more expensive manner or by adding other improvements might have lessened the damage. Nonfeasance is not negligence or a wrong. To refuse compensation because in theory some more elaborate or complete scheme might have been adopted by the municipality to obviate the difficulty, would, in my opinion, impose on claimants an intolerable burden in establishing their case, and is not required by the statute or by the decisions.

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I think that the facts of this case bring it within the category just suggested. Possibly the appellants might have done some additional thing which would have obviated this seepage, but they have not done so. What they have done was warranted by the statute, and no evidence has been adduced to shew that what was done was negligently carried out.

The second point does not, in my opinion, arise under the facts of this case. The actual access from the respondents' premises to the highway remains complete and continuous, exactly as before the construction. What has been done is to interfere with the highway at a point 8 or 10 feet away from the respondents' lands, and the sole question that arises is, whether the value of the respondents' lands has been injuriously affected by such construction.

The cases of *McCarthy v. Village of Oshawa*, 19 U.C.R. 245, *Williams v. City of Portland*, 19 S.C.R. 159, and *Donaldson v. Township of Dereham*, 10 O.W.R. 220, were cases of actions against municipal corporations for damages arising out of the failure by the defendants to provide and maintain on the highway adequate and suitable conveniences so as to facilitate the ready and safe access of the plaintiffs to the highway. It was held in the first two cases that no obligation to provide such artificial means of access was imposed on the municipalities, and the last case went off on other grounds, so that the point was not determined.

But nothing appears in any of these cases to negative the right of a land-owner, whose access to his lands is impaired, to recover compensation for such injurious effect; and, if it were necessary to determine the question, I should be of opinion that if in any degree whatever the municipality lessens a land-owner's access to the highway, he is entitled to maintain a claim for compensation, though in many cases the damages might be merely nominal, depending as they must in each case on the extent of the interference.

With respect to the cross-appeal by the claimants, recent decisions of our higher Courts have indicated a great reluctance to increase the amount of any award. In the present case, the arbitrator is a man of great experience, particularly in regard to the value of properties in the city of Toronto and damages of the character of those here in question. He is also an officer of un-

limited patience and thoroughness in investigating all matters that come before him; and no sufficient case has, in my opinion, been made by the appellants for increasing the present award. For this reason, I am of opinion that the amount awarded by him ought not to be interfered with, and I would therefore dismiss the appeal and the cross-appeal, both with costs.

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*The Court being divided as to the main appeal,
both appeals were dismissed with costs.*

[APPELLATE DIVISION.]

TOWNSHIP OF EUPHRASIA V. TOWNSHIP OF ST. VINCENT.

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Highway—Line between Townships—"Deviation"—Road wholly within one Township—"Laid out and Opened"—Intention—Municipal Act, R.S.O. 1914, ch. 192, sec. 458.

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The judgment of CLUTE, J., declaring that a certain road lying wholly within the township of Euphrasia was a deviation from the town-line between Euphrasia and St. Vincent, within sec. 458 of the Municipal Act, R.S.O. 1914, ch. 192, and that both township corporations were responsible for its maintenance, was reversed by a Divisional Court on appeal.

Per MEREDITH, C.J.C.P., and LENNOX, J.:—If sec. 458 referred to a permanent change of locality, the road in question could not be a deviation, for it was never intended as a permanent substitute for the town-line. If the section embraced temporary deviation, the road might be regarded as such a deviation; but the time had come to an end, because the defendants (St. Vincent), within their rights, insisted upon opening the original allowance and ending the temporary deviation.

Per RIDDELL and MASTEN, JJ.:—A substantial change was made in the section (originally enacted by 48 Vict. ch. 39, sec. 22) by the Municipal Act of 1913, 3 & 4 Geo. V. ch. 43, sec. 458, now R.S.O. 1914, ch. 192, sec. 458. The law is now more inclusive in that the provision is effective for all purposes of the Act and not simply of the section; less inclusive in that only such roads are provided for as have been or may be (a) "laid out and opened" (b) on account of physical difficulties or obstructions and (c) in order to obtain a better line of road. This road was not "laid out and opened" with the intention of following the boundary-line even in part; it did not and was not intended "in some place or places" to deviate from the boundary-line; and so it was not a deviation.

ACTION for a declaration of the opening of a deviation road through the township of Euphrasia, in lieu of the town-line between that township and the township of St. Vincent, and to establish the defendant township corporation's liability for maintenance and repair.

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November 13 and December 6 and 7, 1915. The action was tried by CLUTE, J., without a jury, at Owen Sound.

W. D. Henry, for the plaintiffs.

W. H. Wright, for the defendants.

December 10, 1915. CLUTE, J.:—The parties to this action are adjoining municipalities in the county of Grey. The original road-allowance or town-line has never been opened west of the road-allowance between the 9th and 10th concessions of St. Vincent. The town-line runs east and west between the townships. The plaintiffs claim that a deviation road in lieu of the town-line has been opened through the township of Euphrasia, within sec. 458 of the Municipal Act*, and ask for a declaration that, under that section, the said road is a deviation of the boundary-line or road-allowance between the townships of St. Vincent and Euphrasia; and ask for an order declaring that the defendants are, equally with the plaintiffs, responsible for the maintenance of the said road; and claim \$721.74 as half of the amount of moneys expended by them in maintenance and repair from the year 1891 to 1914 inclusive.

The defendants deny that the road in question is a deviation within the Act, or that the same was constructed on account of physical difficulties or of obstructions existing in the town-line; and claim that the road in question was built to afford access to Walters' mill, at first located to the south of the town-line and east of the road in question, which was abandoned afterwards, and another mill built at Walters' Falls, south and west of the road in question. The defendants also deny that the road in question was lawfully laid out and established as a public highway, and claim that it was not of sufficient width to comply with the statute, and that the county council never passed a by-law for maintaining the bridges, nor has it assumed the said bridges,

*458. Where, on account of physical difficulties or obstructions existing on a boundary-line between municipalities, and in order to obtain a better line of road, a road has been heretofore or is hereafter laid out and opened which does not follow the course of such boundary-line throughout, but in some place or places so deviates from it as to lie wholly within one of the municipalities, such road shall nevertheless be deemed to be, for the purposes of this Act, the boundary-line between the municipalities; and a river, stream, pond or lake which crosses it where it so deviates shall be deemed to be a river, stream, pond or lake crossing a boundary-line within the meaning of this Act.

and the defendants deny liability for any of the expenses thus far for repairs and maintenance.

The evidence upon both sides is conclusive that the town-line, on account of physical difficulties and obstructions existing thereon, is impracticable without deviation; but it is contended by the defendants that, by making four deviations, aggregating in all about four acres, and by the expenditure of something over \$4,000, the road can be opened on and near the town-line, which would be equal to or better than the road in question. The road in question, which for convenience I will call the deviation, was laid out at least 50 years ago, and statute labour and public money have been expended thereon ever since; the aggregate of which since 1891 amounts to over \$1,400. The road is about 3 rods wide, although at one point, where it narrows into an embankment, the railings are used as part of a farm fence. On a considerable portion of it, broken stone has been placed, and the road compares favourably for traffic with the other public highways in either of the municipalities. It now affords reasonable accommodation for both townships, and from the evidence I should judge is as much used by the inhabitants of the township of St. Vincent as by those of the township of Euphrasia, or more so.

I entertain no doubt that it was laid out where it was owing to the obstructions and difficulties in making a road on the town-line and in order to obtain a better line of road. So far as the evidence shews, it has given reasonable and adequate accommodation to the inhabitants of both townships in lieu of the town-line. There is no question in my mind that the deviation has been for many years a public highway by user and by the expenditure of public money and the application of public money thereon for its improvement.

No by-law appears to have been passed formally assuming it, but in its improvement two slight deviations from where it was originally laid out were made, and for that purpose the Township of Euphrasia, the plaintiffs, passed by-laws and procured deeds of conveyance, so that in the plainest possible way they have assumed the same as an existing highway.

The county council have also recognised it as a deviation under the statute by directing the repair of a bridge, and paying for

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such repair; for which they would only be liable if the road is a deviation for a town-line within the statute.

The Township of St. Vincent, the defendants, refused to contribute; and, after demand had been made, a petition was signed by some of the inhabitants of that township and others, asking the county council to direct that the town-line be opened. This the county council refused to do, and gave the very good advice that the matter should be settled between the municipalities by themselves. I cannot think that this action in regard to opening the town-line was due to the fact that the plaintiffs had made a call for contribution for the maintenance of the deviation road. I find that the road in question is a deviation within the statute, and that the defendants are responsible with the plaintiffs for its maintenance.

It does not appear to me to be equitable to make the defendants liable, nor do I think the defendants liable, for repairs prior to the demand made shortly before action brought. Under the Municipal Act, R.S.O. 1914, ch. 192, sec. 455, where there is joint liability there is joint jurisdiction for maintenance. The expenditure theretofore made was made at the sole instance of the Township of Euphrasia, and it does not appear to me equitable that the defendants should now, at this distance of time, be called upon to pay these arrears.

The plaintiffs are entitled to a judgment declaring the deviation road in question to fall within sec. 458 of the Municipal Act, and that the parties hereto are liable hereafter for its maintenance in their due proportion; as to which, if the councils fail to agree as to the proportion of the expense to be borne by each corporation, the same may be determined by arbitration under sec. 455.

Reference may be made to the following cases: *Township of Fitzroy v. County of Carleton* (1905), 9 O.L.R. 686; *County of Wentworth v. Township of West Flamborough* (1911), 23 O.L.R. 583, affirmed in appeal (1912), 26 O.L.R. 199.

The plaintiffs are entitled to the costs of action.

The defendants appealed from the judgment of CLUTE, J.

February 14. The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and MASTEN, JJ.

W. N. Tilley, K.C., and *G. Alberry*, for the appellants. The road in question was not proven to be a deviation of the town-line between Euphrasia and St. Vincent. At the only point where it reaches the town-line, it is a deviation of the 11th line of Euphrasia. The road does not fulfill the requirements of sec. 458 of the Municipal Act. It was never "laid out and opened," within the meaning of those words in the section, nor was it laid out and opened "on account of physical difficulties or obstructions existing on the boundary-line," nor "in order to obtain a better line of road." Section 458 has no application to a deviation wholly or partly used to avoid physical difficulties or obstructions existing on roads wholly within one township. The road in question was never established by any by-law, but was and is a trespass road, and as such is not within the provisions of sec. 458. It had its origin in a private way or short road to the village of Walters' Falls, and was never used and is not now used as a deviation of the town-line. The road, at its greatest width, is only 50 feet wide, and could not legally be laid out or established as a highway.

W. E. Raney, K.C. and *W. D. Henry*, for the plaintiffs, respondents. The road in question is a deviation of the town-line within the meaning of sec. 458 of the Municipal Act, as found by the learned trial Judge. Though no by-law appears to have been passed assuming the deviation road, yet the evidence shews that as a matter of fact the road was assumed as a deviation road. The county council also recognised it as a deviation road: We refer to *Township of Fitzroy v. Township of Carleton*, 9 O.L.R. 686; *County of Wentworth v. Township of West Flamborough* (1911-2), 23 O.L.R. 583, 26 O.L.R. 199.

Tilley, in reply.

March 17. MEREDITH, C.J.C.P.:—At the close of the argument, it is said, on behalf of the defendants, that this litigation is carried on, on their part, to avoid only a judgment that would make the road in question permanently part of the town-line; whilst, in the plaintiffs' behalf, it is said that all they now seek is a judgment which will make it part of the town-line only until the original allowance is opened up; and so it is difficult to understand why there should have been any litigation upon the subject,

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or why it should be continued. It seems reasonable that the place in question should be treated as if it were part of the town-line, by the parties to this action, so long as the unopened part of the original allowance in question remains unopened; because, unquestionably, this road takes largely the traffic that would go over the unopened part of the town-line if it were open; whilst it would be very unreasonable to say that this road for all time to come must be deemed part of the town-line.

Difficulties arise whichever way the question of permanency or not is looked at; difficulties which must arise so long as there is no separate provision for each case. There may be cases in which the deviation must be permanent, in the sense of a permanent change of location; but ordinarily the deviation is perhaps of a more or less temporary character, as in this case, in which no one could ever have thought that the opening of the original allowance would be always practically impossible; it must always have been evident that some day it should be opened, and the owners of lots abutting upon it, as well as the travelling public, benefited. And that day seems to have come; at all events the defendants have made efforts to open, and are desirous of opening, it.

The 468th section of the Municipal Act provides for the determination by the county council of the character of the work to be done in opening, repairing, or maintaining a township boundary-line, or the proportions in which the cost of the work is to be borne, when the townships concerned fail to agree as to these things; and it also provides for the ratepayers interested applying to the county council to compel the townships to open it, if they are unwilling to do so; but it may be that, if the deviation is a permanent substitution of one place for the other, the original allowance part ceases to be a town-line; and, if so, there does not seem to be any method by which it can be opened and made a public road; for which township would have jurisdiction over it? And both could, only if a town-line.

The result seems to be this, that, if the legislation refers to a permanent change of locality, then the road in question cannot be a deviation; for no one ever had any such intention; it is out of the question: whilst, if the legislation embraces temporary deviation, there might be much to be said in favour of the finding

of the learned trial Judge that the case is really one of a deviation; but there is that which is conclusive against the plaintiffs: that time has come to an end; within their rights the defendants insist upon opening the original allowance and ending the temporary deviation. There is not power to prevent that; all that can be done is to require the county council to determine as to the character of the work to be done, or as to the proportion of the cost of the work to be borne, by each township, if they cannot agree between themselves as to such things.

The result works no injustice to the plaintiffs. For many years they have gone on improving and repairing the road as if it were entirely under their control, and they alone bound to keep it in repair; no claim of any character having ever been made, until recently, upon the defendants, in respect of it.

There is a bridge upon the road which now needs rebuilding, and the need for the payment of a considerable sum of money for that purpose has caused some research for a means of putting the burden on other shoulders; and the way grasped at was to make it in law part of the town-line, the bridges of which the county must maintain; hence all this litigation. The burden of the bridge-building, and of opening and maintaining the original allowance as the town-line road, may be unexpected and heavy, but the plaintiffs cannot escape it in the way they have sought in this action.

The appeal must be allowed; and the action must be dismissed.

LENNOX, J.:—I agree.

RIDDELL, J.:—An appeal from the judgment of Mr. Justice Clute, by the defendants the Corporation of the Township of St. Vincent.

Of the *locus in quo* I give a rough plan, sufficiently accurate for the purposes of this appeal.

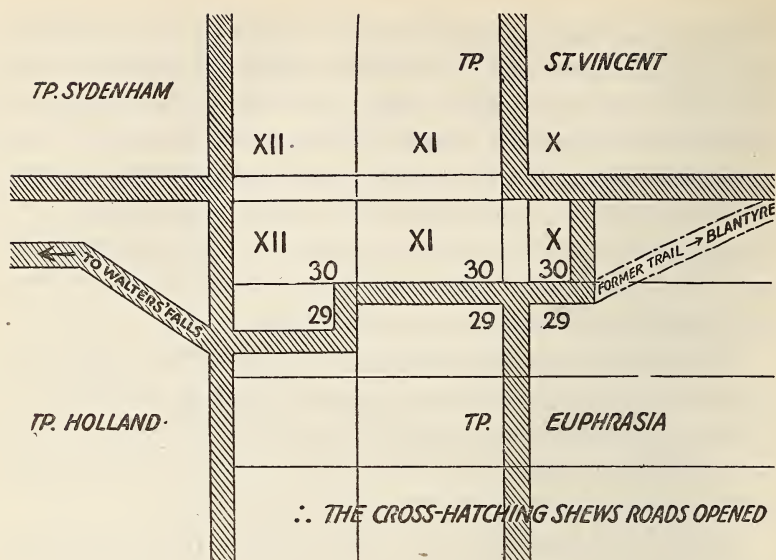
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In the county of Grey, the townships of Euphrasia, St. Vincent Sydenham, and Holland, corner south-east, north-east, north-west, and south-west respectively, St. Vincent being north of Euphrasia. That part of the town-line between Euphrasia and St. Vincent from the four corners at the west, east past concessions XII. and XI., has never been opened; in front of concession X. the town-line is open; about half way (east and west) of concession X. of Euphrasia runs a road south through lot 30; then it turns and runs at right angles along and on the northern part of lot 29 west through concession XI., then at right angles a short distance south through the north part of lot 29 in concession XI. (and perhaps XII.), then at right angles west through lot 29 of concession XII. to the town-line of Euphrasia and Holland. This is the road concerning which this litigation is brought—but, after crossing the town-line of Euphrasia and Holland, the road continues in a north-westerly direction through Holland to a hamlet, Walters' Falls.

The Township of Euphrasia have maintained the road (within its limits), and claim in this action that it is a "deviation" for the town-line between it and St. Vincent, and that St. Vincent should assist in maintaining it. The learned Judge has given effect to this claim; and St. Vincent now appeals.

Euphrasia was surveyed in 1826, St. Vincent in 1835, Sydenham in 1835, and Holland in 1846; no trace appears of any road in the position of the present, in the filed notes or plans in the Crown Lands Department.

About 1858, John Walters built a mill, a saw-mill, grist-mill, and carding-mill, on a small stream on lot 30, con. X., Euphrasia, but left it after two years and went to what is now Walters' Falls, in Holland. There, on the 17th September, 1860, he received a patent of the south half of lot 1 and the whole of lot 2, con. XII. of Holland. He built a mill at Walters' Falls about 1860, and of course desired an easy way of access thereto for intending customers. There was a trail through the bush not very different topographically from the disputed highway, and running from what is now Walters' Falls to Blantyre, a place a short distance north-east of the turn (west of lot 30, con. XII., Euphrasia) of the present road—at Blantyre was a store to which the settlers resorted. This trail seems to have existed till 1865: it is not at all unlikely that this trail was used because the town-line was not open; but no one who is at all acquainted with the customs of a newly settled part of Upper Canada would venture to say so positively. At all events it does not appear to have been laid out by any municipal authority or to have been made in any way a township road, remaining a bush trail, "a trail through the bush—no established road."

Some time about 1865, John Walters had the present road surveyed or blazed out by Squire Carr, gave a great deal of land for it, and practically built the road. So say the plaintiffs' own witnesses—and the road was known by some at least as "the Walters road." A witness for the defence says that Walters bought land on purpose to give people a way through to his mill, and it is certain that he gave a connecting road in Holland.

From all the evidence, it is reasonably plain that Walters, wanting custom for his mill, made, at his own expense, a better road at about the same place as the old trail, on land mostly, if not wholly, given by himself—without reference to township or other authority. He selected the best available route and approximately the old established way—it is not at all unlikely that he would not have gone to all this expense and trouble had the town-line or other suitable road been open.

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At some time, precisely when does not appear, the plaintiffs adopted that part of the road within the borders of their township as a township road, and have had statute labour done on it, repaired it, laid it in part with road metal, &c., and made a reasonably good road of it—much better than many even in older settlements.

It would cost a considerable sum, from \$2,500 to \$4,000, to open the town-line, and even then there would be divergences from the original road-allowance, of some extent longitudinally, if trifling laterally.

The question whether this can be called a deviation of the town-line depends on the wording of the statute 3 & 4 Geo. V. ch. 43, sec. 458—R.S.O. 1914, ch. 192, sec. 458.

This section first appears in 1885, 48 Vict. ch. 39, sec. 22, introducing a new section, 535, in place of the former sec. 535 of (1883) 46 Vict. ch. 18. This referred solely to the duty of county councils to erect and maintain bridges over rivers forming or crossing boundaries between two municipalities—and (sub-sec. (2)) “a road which lies wholly or partly between two municipalities shall be regarded as a boundary-line within the meaning of this section, although such road may deviate so that it is in some place or places wholly within one of such municipalities, and a bridge built over a river crossing such road where it deviates as ^{as} aforesaid shall be held to be a bridge over a river crossing a boundary-line within the meaning of *this section*,” i.e., solely for the purpose of defining the duty of the county. This next appears (unchanged) as R.S.O. 1887, ch. 184, sec. 535 (1), (2); again with some slight changes in R.S.O. 1897, ch. 223, sec. 617(2); and then 3 Edw. VII. ch. 18, sec. 131, introduced the proviso, “provided that such deviation is only for the purpose of getting a good line of road.”

The change made by 3 & 4 Geo. V. ch. 43, sec. 458, is substantial: (1) the provision is made “for the purposes of the Act,” and no longer “within the meaning of this section;” and (2) it is no longer “a road which lies wholly or in part between two municipalities” where the *deviation is*, to get a better line of road, which is provided for; but only “where, on account of physical difficulties or obstructions existing on a boundary-line . . . and in order to obtain a better line of road, a road has been here-

tofore or is hereafter laid out and opened which does not follow the course of such boundary-line throughout," does the section apply. The law is now more inclusive in that the provision is effective for all purposes of the Act and not simply of the section; less inclusive in that only such roads are provided for as have been or may be (a) "laid out and opened" (b) on account of physical difficulties or obstructions and (c) in order to obtain a better line of road. Formerly it was wholly immaterial why the "deviation" came into existence so long as the road "lies . . . between two municipalities" and the deviation "is . . . within one of the municipalities" "only for the purpose of getting a good line of road"—and that is why so little is said or made of the origin of the road in *Township of Fitzroy v. County of Carleton*, 9 O.L.R. 686, although not wholly disregarded (see p. 692)—and why it is "the present condition of the deviation, and not its past history or origin," which "is to be regarded," because "the getting of a good line of road seems *now* to be the sole purpose of this deviation" (p. 694). At that time there must have "come a time when it is no longer a question of origin" (p. 697)—now the origin is all-important.

So too in *County of Wentworth v. Township of West Flamborough*, 26 O.L.R. 199, "its origin and history are of less consequence that the facts existing when the question arises, when the main inquiry must be, is the road now a public highway, and is it in fact serving the public purposes which a road upon the original road allowance would have served?" (p. 201).

We are untrammelled by authority and we have no assistance from decisions of the Courts on the interpretation of the present section.

It seems to me that the section necessarily implies that some competent authority must be laying out and opening a road intended to follow in the main the course of the boundary-line; that, in the course of such laying out and opening, the road "does not follow the course of the boundary-line throughout," but, "physical difficulties or obstructions" appearing on part of the boundary-line, "in order to obtain a better line of road," it is laid out and opened so as to deviate, so "as to lie wholly within one of the municipalities." "It is *the road* that may deviate . . . that is to say, the road that was intended to run on the line

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may (accidentally by reason of inaccurate surveying, or) purposely in order to shun some obstacle (or for some other cause), get off the line:" *per* Patterson, J.,* quoted by Boyd, C., in *County of Wentworth v. Township of West Flamborough*, 23 O.L.R. 583, at p. 589 (the words in parenthesis are inapplicable here).

Looking now at the all-important matter, i.e., how the road was "laid out and opened," it is plain that it was not "laid out and opened" with the intention of following the boundary-line even in part; that it did not and was not intended "in some place or places" to deviate from the boundary-line. It was not a deviation, whatever else might be said for it, even assuming that the adoption of the road by the township could be considered a ratification of Walters' actions.

I pay no attention to the other questions which were raised, thinking these considerations sufficient for the disposal of the case.

The appeal should be allowed and the action dismissed, both with costs.

MASTEN, J.:—I agree.

Appeal allowed.

* In the Supreme Court of Canada, *County of Victoria v. County of Peterborough* (1889), Cameron's Supreme Court Cases 608.

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McEWAN v. TORONTO GENERAL TRUSTS CORPORATION.

Executors and Administrators—Claim against Executors of Deceased Person—Promise to Pay Sum of Money in Addition to Sum Paid in Settlement of Action—Evidence—Corroboration—Evidence Act, sec. 12—Failure to Establish Binding Promise—State Claim—Consideration—Uncertainty—Statute of Frauds—Parties—Administrator—Executors de son Tort—Practice—Statute of Limitations.

In 1909, an action was brought by the present plaintiff and his two brothers against several defendants; one of the defendants was a company in which C. was largely interested; in November, 1909, a settlement of that action was effected, the plaintiffs being paid \$3,800 in satisfaction of all their claims. C. died in November, 1913; and this action was begun in September, 1914, to recover from the estate of C. the sum of \$1,000 which, it was said, the plaintiff and his brothers were to receive from C., in addition to the \$3,800, for settling their claims in the former action. The claim was

based upon a promise, not in writing, alleged to have been made by C., at the time of the settlement of the former action, to the solicitor for the plaintiffs in that action; the solicitor, at the trial of this action, testified that the promise was made, and his testimony was to some extent corroborated, as the trial Judge found, by the testimony of the solicitor who had acted for the defendants in the former action:—

Held (RIDDELL, J., dissenting), that no binding promise was proved to have been made or was intended to have been made.

Judgment of SUTHERLAND, J., reversed.

Per MEREDITH, C.J.C.P.:—No reasonable excuse for the staleness of the claim was made; and no consideration was proved. It would be dangerous if claims such as this could be established against a man who could not be heard in his own defence, upon such equivocal and uncertain evidence as that adduced in this case; and none the less so because the witnesses all testified as fairly and accurately as could be expected after such a lapse of time.

Hill v. Wilson (1873), L.R. 8 Ch. 888, and *In re Garnett* (1885), 31 Ch.D. 1, referred to.

Per MASTEN, J.:—No contract to which the Court could give effect was established, because C.'s statement of intention, in the circumstances in which it was made, was too vague and uncertain in its nature to be capable of enforcement in a Court of law; and the circumstances and the subsequent conduct of the parties shewed that it was a statement of a gratuitous intention, and not a binding contract.

Per RIDDELL, J.:—(1) There was ample corroboration of the testimony of the solicitor for the plaintiffs in the former action to answer the requirements of sec. 12 of the Evidence Act, R.S.O. 1914, ch. 76. (2) There was a promise by C. to pay a certain sum in consideration of the plaintiffs settling the action; as this promise was no part of the settlement, it did not appear in the settlement. (3) There was delay in demanding payment, which might be suspicious, were it not for the evidence of the said solicitor, to which the trial Judge gave full credence. (4) The Statute of Frauds did not afford a defence to the action; C.'s promise was not to pay the debt of another, but to pay money in consideration of a certain thing being done. (5) The action was properly constituted: the sole plaintiff was one of the three plaintiffs in the former action, who had in 1910 obtained letters of administration to the estate of his father, in respect of which the former action was brought, and to which the \$1,000 was considered by all parties to be payable; the plaintiffs in that action had intermeddled with the estate and had become executors *de son tort*. If the defendants desired it, the other two brothers might be added as parties to this action. (6) Remarks on the practice as to adding parties and the effect of the Statute of Limitations.

ACTION against the executors of James I. Carter, deceased, to recover a sum of money and interest, upon an alleged agreement or promise by the deceased.

The action was tried by SUTHERLAND, J., without a jury, at Goderich.

C. Garrow, for the plaintiff.

A. Weir, for the defendants.

November 15, 1915. SUTHERLAND, J.:—One Peter McEwan died intestate on the 28th day of January, 1904. He was at the time the owner of the Goderich Salt Works.

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By lease, dated the 1st day of February, 1905, three of his sons, the plaintiff being one, assumed, as "representing" his estate, to lease the said salt works to one Ransford, for a term of five years at an annual rental of \$2,000. The lessee assigned the lease to a partnership called the Dominion Salt Agency, consisting of the Canadian Salt Company Limited, the Empire Salt Company Limited, and a partnership firm of two brothers of whom the said Ransford was one.

This agency company paid the rent for two years, and during the second, namely, on the 22nd October, 1906, by a written notice directed to the lessors, assumed to "determine" the lease on the 31st January, 1907. The lessors declined to recognise such attempted cancellation, and, after waiting a considerable time, on the 29th May, 1909, issued a writ against the individual concerns comprising the Dominion Salt Agency, and alleged to be trading under that name, to recover the rent for the remaining three years, namely, \$6,000, and interest.

The lessors by the said writ claimed to sue individually and as representing the said estate. Pleadings were filed and delivered, and the action was ripe for trial, when negotiations for settlement were begun. One James I. Carter was a large stockholder in and a director of the Empire Salt Company.

A defence had been set up in the pleading of the defendants with which he and others concerned were not in sympathy, and he was apparently anxious that a compromise of the suit should be brought about.

Mr. Proudfoot, K.C., was acting for the plaintiffs, and Mr. Hanna, K.C., for the defendants. Mr. Proudfoot was well acquainted with Mr. Carter, and had several conversations with him about the proposed settlement. He says that Carter verbally agreed with him, as representing the plaintiffs, that, if a compromise of the pending action were arranged and carried out, he personally would pay "his share," meaning thereby, apparently, the proportionate share of his company of such balance of the rent and interest as should not be provided for by the terms of the settlement.

I think it is conceded that on a settlement for \$3,800 such balance would be \$3,200, and that, as the alleged share of the Empire Salt Company as compared to the others would be ap-

proximately five-sixteenths, it would amount to about \$1,000, for which suit is brought.

A settlement was effected and is embodied in two letters: one dated the 17th November, 1909, written by Mr. Proudfoot to Mr. Hanna, from which I quote: "I am satisfied if Mr. Carter had personally made the agreement, even if it was a loss, he would settle without a murmur. Why then should he help Ransford out, because that is what it means to reduce this claim? If, notwithstanding all I have said, you and Mr. Carter think this case should be settled and all matters between the McEwans and defendants closed for \$3,800 cash, my clients authorise me to exercise my discretion, and I do so by accepting." The other letter was a reply from Mr. Hanna, dated the 18th November, 1909, as follows: "I have before me your letter of yesterday, in which you propose to settle for \$3,800 cash—each party to pay their own costs. Acting for the defendants, I accept. I have written them accordingly, and am arranging for payment at an early date."

Mr. Hanna also wrote to Mr. Carter, at the time, as follows: "Enclosed herewith I send you copy of letter from Mr. Proudfoot herein, and of my letter to him in reply, settling this at \$3,800, each party to pay their own costs. I send you Proudfoot's letter as setting forth fairly the situation. You will treat it as in confidence. Be good enough to figure out how this \$3,800 will divide up among the three of you." That sum was paid; each of the three partners in the Dominion Salt Agency paying a portion thereof.

Mr. Proudfoot testified that thereafter he saw Carter, who told him that he was glad the matter had been closed, and he would carry out his part of the arrangement. He said that subsequently he wrote to Carter once or twice and spoke to him several times about the matter, and that, while not repudiating the bargain at all, he put him off from time to time under one excuse or another. In the end, Carter died on the 2nd November, 1913, having first made a will, of which the defendant company are the executors, and which has been admitted to probate.

The plaintiff, Hugh J. A. McEwan, to whom letters of administration of his father's estate were issued on the 7th day of March, 1910, brought this action, by writ dated the 24th September, 1914, endorsed as follows:—

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Feby. 1. To balance of rent of the Goderich
Salt Works as settled and agreed
on, \$3,200 of which the late J. I.
Carter's share was $\frac{5}{16}$ 1,000.00

Feby. 1. To amount of costs guaranteed in
suit vs. Ransford..... 200.00

1913

Dec. 15. To interest on \$1,200 for 3 years, 11
months, at 5%..... 235.00

\$1,435.00

The evidence of Mr. Hanna, though distinctly to the effect that, in so far as his clients, the defendants in the first named suit, were concerned, the settlement was intended to relieve them from any claim with respect to the whole debt by the payment of the \$3,800, and that it was no part thereof that Carter was to be liable for the payment of any balance, nevertheless corroborates that of Mr. Proudfoot to some extent. He says that Carter said to him that, although the matter was being settled at \$3,800, "it was his intention to see that, so far as the share of his company was concerned, he would see that the plaintiffs were paid."

In the statement of defence in the present action it is alleged, among other things, that the lease referred to was invalid, owing to the fact that the lessors had no power to make the same on behalf of the estate, and that the contract therein embodied was void as against public policy. During the negotiations for settlement of the first action, Carter appears to have been referred to and treated as the company in which he was so much interested, and seems to have well-nigh assumed that he was. He was in fact, as a shareholder, pecuniarily interested in the proposed settlement being brought about. The lease was apparently treated by all parties, in the negotiation for the settlement, as though the lessors and plaintiffs were legally qualified to represent the estate for which they purported to act, and to conclude a binding settlement.

At the trial, it was contended on the part of the defendants that, Carter being dead, and the action brought against his estate,

there was no corroboration of the evidence of Mr. Proudfoot.* If corroboration is necessary where the evidence relied on to support the claim against the estate is that not of a person interested therein but that of his solicitor, I think that in this case the evidence of Mr. Hanna may well be considered a sufficient corroboration. But it is said that, though the three McEwan brothers brought the action which was settled, not only on their own behalf but on behalf of their father's estate, as letters of administration had not then issued to that estate, neither they nor their solicitor was in a position legally to ask for or receive such a promise from Carter. I think, however, it can be properly said that, the action being framed as it was, Carter was in effect making a promise to the estate, and a promise, it is clear, on the evidence of Mr. Proudfoot, which he recognised and in effect confirmed after letters of administration had issued.

I would, therefore, in these circumstances, be disposed to think and determine that the promise is binding upon Carter's estate, unless the defence set up to the effect that, under the Statute of Frauds, it is a promise to answer the debt of another, and is not in writing, is effective. But, when the settlement referred to was made, it clearly contemplated the extinguishment of the whole debt in so far as the defendants were concerned. When the \$3,800 was paid, there was no further obligation on the part of any of the defendants, and the plaintiffs could not thereafter make or enforce the claim in whole or in part against the Dominion Salt Agency or any of the three defendants comprising it. Carter, while interested in the settlement of the action in consequence of his interest in the Empire Salt Company, had no personal liability for the original debt. What he did was to make a personal promise in connection with the settlement that, if a certain sum were accepted by the plaintiffs in full of their claim against all of the defendants for the whole sum, he himself would pay a part of the balance, which would represent the additional part of the whole claim which his company would have paid if the entire debt had been paid by the defendants.

*Section 12 of the Evidence Act, R.S.O. 1914, ch. 76, provides: "In an action by or against the heirs, next of kin, executors, administrators, or assigns of a deceased person, an opposite or interested party shall not obtain a verdict, judgment or decision, on his own evidence, in respect of any matter occurring before the death of the deceased person, unless such evidence is corroborated by some other material evidence."

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Upon the authorities I am disposed to think that this is not a promise covered by the statute. The interest of Carter in the litigation and the compromise of the suit constituted, I think, a sufficient consideration for the promise. Reference to Halsbury's Laws of England, vol. 15, paras. 889, 890, 891, 892, 893, and 894; *Goodman v. Chase* (1818), 1 B. & Ald. 297; *Guild & Co. v. Conrad*, [1894] 2 Q.B. 885; *Howes v. Martin* (1794), 1 Esp. 162; *Stephens v. Squire* (1697), 5 Mod. 205; *Harburg India Rubber Comb Co. v. Martin*, [1902] 1 K.B. 778.

I am unable to find upon the evidence that the defence of the contract being void as against public policy was made out.

At the trial, it was well-nigh conceded on the part of the plaintiff that he could not succeed in so far as the claim for \$200 for costs alleged to have been guaranteed in the suit against Ransford was concerned; and this claim will be dismissed.

The plaintiff will, therefore, have judgment against the defendants for the sum of \$1,000 and interest thereon as claimed, with costs.

The defendants appealed from the judgment of SUTHERLAND, J.

February 14. The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and MASTEN, JJ.

A. Weir, for the appellants.

C. Garrow, for the plaintiff, respondent.

March 17. MEREDITH, C.J.C.P.:—In the year 1909, the plaintiff and his two brothers brought an action against three salt-producing and marketing concerns to recover \$6,000, arrears of certain yearly payments which these concerns had agreed to make to the plaintiffs, for what was, substantially, the prevention of competition by them with these concerns in the salt markets of Canada.

A formidable defence was made, in behalf of all the defendants, in that action: it was said that the contract was an invalid one because it provided for an illegal restraint on trade, punishable as a crime under the Criminal Code of Canada.

In November, 1909, a settlement was effected between all the parties to that action, of all of the plaintiffs' claims made in it.

There can be no doubt, and there is no dispute, about that. The plaintiffs accepted and were paid \$3,800 in satisfaction of all their claims: all of which appears in the letters of the solicitors written for the purpose of making it plain, letters fully answering that purpose.

In the year 1914, this action was brought to recover from the estate of one Carter, deceased, \$1,000 which, it is now said, the plaintiff and his brothers were to get, in addition to the \$3,800, for settling their claims in the former action: as well as for a sum of \$200, as to which the action was dismissed. That is, although more than six years ago such a settlement was made releasing absolutely all the debtors, the plaintiff and his brothers may now recover, from the estate of one who was in no sense personally liable for the old debt, the large sum involved in this action over and above the larger sum they, six years ago, accepted in full satisfaction of all their legal rights; and all this though Carter lived for about four years afterwards, and was at all times, according to the testimony, well off, having at one time \$100,000 idle for want of investment, and although the plaintiff makes no pretence, throughout his testimony, of having known, during all these years, of any such obligation, indeed plainly indicates that he did not, as these extracts from it shew:—

“Q. And you sued for \$6,000? A. Yes.

“Q. The reason of that was, you began your action before the expiration of the term? A. Yes.

“Q. And as a result of that action what was done, so far as you know; first, do you know yourself what actual settlement took place? A. Not exactly.

“Q. Of your own knowledge? A. No, sir.

“Q. Who was acting for you in that action? A. Mr. Proudfoot.

“Q. Do you know who was acting for the defendants?

“A. The Honourable Mr. Hanna—Hanna, LeSueur, and Price, I think.

“Q. And, so far as you know, the settlement was carried not between those two gentlemen? A. Undoubtedly; yes, sir.

“Q. What money was paid to you? A. \$3,800, less the costs.

“Q. You paid your own costs out of that? A. Yes.

“Q. You said, as regards the actual settlement, you know

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nothing about it; but has anything further been paid you? A. Beyond the \$3,800?

"Q. Yes? A. No, sir."

Then, two years after Carter's death, this action was brought; and how supported? Not a line, not a word, in writing; all depends on the memory of the two solicitors, in the first action, of what was said by Carter more than six years ago: one solicitor thinking he meant to bind himself to pay the money now sued for, the other apparently quite satisfied that he did not mean to bind himself, or at all events that what he said did not enter into the consideration for the settlement then effected.

What is said by the solicitor who was acting for the plaintiffs in that action is: that Carter came to him to discuss the action with him as a personal friend; and that, in so discussing it, he expressed his disapproval of the defence of illegality, and said that he would not take advantage of it, but would pay the share which his concern might be liable for if the contract were a valid one. Nothing apparently was said as to amount or time or place of payment; nor any suggestion made—as I am sure would have been if a contract binding in law was intended—that it should be made formally through the man's own solicitor, not loosely through his opponent's solicitor.

The solicitor does not as much as suggest that, if it had not been for such statement by Carter, he would not have made the settlement which was made, absolutely releasing all the debtors. When asked, "What was the consideration for Carter's promise?" his answer was, not that there would have been no settlement without it, but only this:—

"Q. What was the consideration for that?

"Mr. Weir: What took place is the question? A. I suppose you gather the consideration from what Mr. Carter said. Mr. Carter said he did not want this matter to come up in Court; that he did not want a defence of that kind to appear; and that, while Ransford had got them into a contract of that kind, they felt that they were in duty bound to pay it."

There is no pretence, by any one, that any promise by Carter formed any part of the consideration for the settlement of the action.

No reasonable excuse for the great staleness of the claim is made: the plaintiff and his brothers needed money, as all men in business do, and Carter was, as I have said, apparently well off.

It is impossible for me to believe that, if the plaintiff and his brothers had a legal right to the money now sued for, and knew of it, it would not have been enforced promptly; and equally impossible to believe that the solicitor would not have told them of it if he thought it then more than a moral obligation, if anything.

No kind of formal or businesslike demand was ever made upon Carter in connection with the matter: the solicitor is sure, however, that he wrote personal letters to him a few times respecting payment of the money, of which letters no copies were kept, nor were any entries made as to them or the sending of them.

All of which strengthens the view that no one deemed there was a legal liability; that all that was said by Carter was that which is sometimes called "big talk," which ninety-nine times out of an hundred refuses to act when confronted with a demand that it be made legally binding.

It would be extremely dangerous if claims such as this could be established against a man who cannot be heard in his own defence, upon such equivocal and uncertain evidence as that adduced in this case: and this, none the less, because the witnesses all spoke as fairly and as accurately as could be expected after such a lapse of time: see *Hill v. Wilson* (1873), L.R. 8 Ch. 888; and *In re Garnett* (1885), 31 Ch.D. 1.

For the two reasons: (1) that no binding promise is proved to have been made or was intended to have been made; and (2) that no consideration has been proved: I would allow the appeal, and dismiss the action.

LENNOX, J.:—I agree.

MASTEN, J.:—This is an appeal by the defendants, as executors of James I. Carter, from the judgment of Mr. Justice Sutherland dated the 15th November, 1915, in favour of the plaintiff.

The action is brought by the plaintiff, as administrator of his late father, Peter McEwan, to recover a debt which is alleged to have arisen under the circumstances following.

It is claimed by the plaintiff that in the year 1909, in consideration of the settlement of an action then pending between Peter James McEwan, Hugh John Alexander McEwan, and William George McEwan, and the Empire Salt Company Limited, and others, carrying on business under the name of the Dominion

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Salt Agency, James I. Carter, now deceased (and represented in this action by the defendants), promised to pay to Peter James McEwan, Hugh John Alexander McEwan, and William George McEwan, the moneys claimed in this action.

It is said that there was no promise made directly to these gentlemen by Carter, but that Carter was well acquainted with Mr. Proudfoot, the solicitor for the plaintiffs in that action; that Carter, being largely interested in the case, was urging Mr. Proudfoot, solicitor for the plaintiffs, to settle that action for \$3,800, and in so doing expressed his intention of supplementing the settlement then under consideration, namely, \$3,800, by seeing to it that the plaintiffs were paid, in addition, such further portion of the remaining \$2,200 claimed by them as should proportionately be borne by the Empire Salt Company as a member of the defendant firm (the defendant firm being, as I have mentioned, the Dominion Salt Agency).

In order that the plaintiffs may recover, it is essential that they should establish: (1) such a binding and definite contract on the part of Carter as would be enforceable in a Court of law; (2) that the benefit of that contract has, by an effective legal transfer, passed to the plaintiff in this action.

I have considered the arguments and the evidence at the trial and have read the reasons for judgment prepared by the Chief Justice of this Court and by my brother Riddell.

I think that no contract has been established to which the Court can give effect, because Carter's statement of intention, in the circumstances under which it was made, was too vague and uncertain in its nature to be capable of enforcement in a Court of law; and not only the circumstances under which it was made, but also the subsequent conduct of the parties, convince me that it was intended as a statement of a gratuitous intention, rather than as a binding contract.

One of the statements made by Mr. Hanna in his evidence is to me most illuminating: "Mr. Proudfoot, I remember, in the conversation asked us, it came up in some way, as to how much that undertaking was worth, and I have no doubt Mr. Proudfoot puts it as I probably did—I do recall saying to Mr. Proudfoot, 'You know Mr. Carter as well and longer than I do, but, knowing

him as I do, I would feel very confident that that would be paid in full.””

Carter appears to have been well known as a man of ample financial means, and the remark quoted appears to me to relate, not to financial ability, but to the likelihood of Carter's implementing his expressed intention, notwithstanding the fact that it was legally unenforceable. Mr. Proudfoot's statement at p. 29, line 9, looks in the same direction, where, in speaking of his discussion with Mr. Hanna, he says: "We had been talking about Carter paying up the balance, and I also referred to the fact that Carter expected to be able to get Mr. Henderson to do the same thing. *Then I raised some question of doubt about whether they would pay it or not.*"

For these reasons, I agree with the conclusion of my Lord that no binding promise is proved to have been made—or was ever intended to have been made.

RIDDELL, J.:—An appeal by the defendants, as executors of James I. Carter, from the judgment of Mr. Justice Sutherland of the 15th November, 1915.

In January, 1904, Peter McEwan, a salt-producer and proprietor of the Goderich Salt Works, died intestate, leaving a widow and six children, three sons and three daughters.

In February, 1905, the three sons, "Peter James McEwan, Hugh John Alexander McEwan, and William George McEwan, representing the estate of Peter McEwan," entered into an agreement with John Ransford, from which all the difficulty of this case arose.

The McEwans agreed that for five years Ransford should have the control of the Peter McEwan Salt Works (they are called "the Salt Works of the parties of the first part")—in consideration therefor Ransford agreed to pay them \$2,000 per annum, the McEwans to be at liberty to manufacture salt for local retail trade, to be sold at a price fixed by Ransford, but not elsewhere or otherwise, and also they were to discourage the erection of any other salt works at Goderich. This agreement was expressed to be binding upon Ransford and his assigns.

On the 11th April, 1905, Ransford assigned to the Dominion Salt Agency of London, a partnership consisting of (1) a firm of

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which Ransford was a member, (2) the Canadian Salt Company Limited, and (3) the Empire Salt Company Limited. This partnership, the Dominion Salt Agency, took possession of the property, and for some time paid as provided in the agreement. By a document under seal, the agency gave notice on the 22nd October, 1906, to the McEwans, "representing the estate of Peter McEwan," that the contract would be terminated on the 31st January, 1907.

The lessors refused to consent to the cancellation of the agreement, and on the 29th May, 1909, brought action in their individual names, but in the statement of claim the plaintiffs are set out thus: "Peter James McEwan, Hugh John A. McEwan, and William George McEwan, representing the estate of Peter McEwan." The defendants were John Ransford, and John Ransford, the Canadian Salt Company Limited, and the Empire Salt Company Limited, carrying on business under the name of "The Dominion Salt Agency"—the claim was for \$6,000, balance due on the agreement.

The defendants set up that the agreement was void as against public policy; that the agreement had been obtained by the McEwans representing untruly that they represented the estate of Peter McEwan.

James I. Carter, whose estate is represented by the defendants in this action, was a large shareholder in the Empire Salt Company. He was a man of honour and business integrity—and he told Mr. Proudfoot, the solicitor for the plaintiffs in that action, that he did not, as a business man and a man of honour, care to press the defence. He further said: "You and Mr. Hanna" (the solicitor for the defendants) "go on and make the settlement—I will give you my word of honour, after the settlement is made, that I will pay up the balance of my share." Mr. Proudfoot told him his name did not appear on the record, that the Empire Salt Company was the defendant, and he said, "I am the Empire Salt Company." Being asked if the Empire Salt Company would be bound by any such arrangement as that, he said: "It does not make any difference, this is my promise. I am going to pay the money, and the company has nothing whatever to do with it . . . I am going to pay the money . . . You and Hanna go on and make the settlement . . . I also promise you this,

after the settlement is arrived at, I will do my best to get Mr. Henderson" (who seems to have represented the Canadian Salt Company) "to pay up his share, and I think I can get him to do it; but, so far as that man Ransford is concerned, I won't have anything to say about his share." What this means is: an honest business man, being (in substance) defendant with two other defendants, does not desire to take advantage of what may be a legal but certainly not a moral defence; knowing that his co-defendants cannot be induced to waive this defence and to pay the full amount of the honest claim, he says to the plaintiffs: "Make the best settlement you can; I shall try to get one of my co-defendants to do the honest thing, and I think he will; the other is a rascal, whom I shall have nothing to do with—anyway I shall pay my share of the true amount due"—and he makes this a personal promise, not the promise of his company, the nominal defendant. Mr. Proudfoot agreed and made a settlement of the action with Mr. Hanna for a smaller sum than was claimed, being assured by Mr. Hanna that Mr. Carter was a man of his word. Carter had had conversations with Mr. Hanna which it may be well to give in Mr. Hanna's own words: "When we came to the settlement at \$3,800, I think he" (i.e., Mr. Carter) "had also seen Mr. Proudfoot—he was born up in that locality and had a very friendly feeling towards all parties there—and he said, although the matter was being settled at \$3,800, that it was his intention, so far as the portion of the claim represented by the Empire Salt Company was concerned, he would see to it that the McEwans were paid in full. That was to me. While that did not enter into the settlement as part of the settlement or come into the settlement in terms at all, I recall, in discussing it, that is, after being authorised to go up to \$3,800, in discussing with Mr. Proudfoot I told him very frankly what had occurred with Mr. Carter. I did not know whether Mr. Carter expressly intended that I should repeat that to Mr. Proudfoot; I did know from what occurred that there had been some discussion on that line between him and Mr. Proudfoot. Mr. Proudfoot, I remember, in the conversation asked us, it came up in some way, as to how much that undertaking was worth, and I have no doubt Mr. Proudfoot puts it as I probably did—I do recall saying to Mr. Proudfoot, 'You know Mr. Carter as well

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and longer than I do, but, knowing him as I do, I would feel very confident that that would be paid in full.' I felt that way about it at the time, and I have not any doubt I so stated. However, as far as I am concerned, it never entered into or was a part of the settlement beyond that."

It seems to me that we have here ample corroboration of Mr. Proudfoot's story so as to answer the statute as interpreted in such cases as *Parker v. Parker* (1881), 32 U.C.C.P. 113; *Radford v. Macdonald* (1891), 18 A.R. 167; *Wilson v. Howe* (1903), 5 O.L.R. 323; &c., &c.

The result is, that there was a promise by Carter to pay a certain sum in consideration of the plaintiffs settling the action—of course, as this promise was no part of the settlement, it does not appear in the settlement.

There was delay in demanding payment, which would—or might—be suspicious in persons of less high standing than Mr. Proudfoot; the learned trial Judge gives full credence to his evidence, and we should accept it at its face value, as I do.

There is no dispute that the aliquot part of the balance unpaid should be paid, if any.

A defence is raised that this was a promise under the Statute of Frauds: but that cannot be—it was not a promise to pay the debt of another, but a direct promise to pay money in consideration of a certain thing being done.

Then we are urged to hold that the action is not properly constituted. The sole plaintiff in this action is "Hugh J. A. McEwan, administrator of the estate of Peter McEwan, deceased"—and it is claimed that he has no cause of action as administrator—he became such by letters of administration on the 7th March, 1910.

I cannot accede to this argument—the three McEwans affected to act for the estate of Peter McEwan, they intermeddled with and disposed of land belonging to that estate—since executors have now to do with real estate of the decedent, I think they became executors *de son tort*. They had so intermeddled long before the expiry of a year from the death of Peter McEwan, and continued that condition after the expiry of the year. Whatever may have been the effect of the statute in vesting the legal fee in the heirs—in fact (apparently with the consent of all concerned),

the "estate" was kept alive with the three sons as executors *de son tort*. They were dealt with as such when they made the original agreement, and when they sued in the original action—the promise was made to them as such through their solicitor. There is no reason, I think, why the plaintiff here, who formally and legally represents the "estate," should not sue.

All parties treated the property as that of the late Peter McEwan, the amount payable under the original agreement was considered by all parties part of his estate, and so was the amount promised to be paid by Carter.

In *Sharland v. Mildon* (1846), 5 Hare 469, the widow, an executrix *de son tort*, who intended to take out letters of administration, employed H. to collect some of the assets of the estate—he did so, thereby becoming a debtor of the estate, if nothing more—he paid the widow, who never became administratrix. The Court, Wigram, V.-C., held that H. could not discharge himself except by paying over to the legal personal representative what he had received.

This is quoted and approved by Wood, V.-C., in *Hill v. Curtis* (1865), L.R. 1 Eq. 90, at pp. 99, 100. *Sykes v. Sykes* (1870), L.R. 5 C.P. 113, 115, distinguishes but does not overrule.

Of course payment to the legal representative would be sufficient.

As all parties considered the money to be payable to the "estate," I think it may and should be considered as part of the estate, and I can see no reason why the present plaintiff, the legally appointed representative of the "estate," should not take advantage of that promise.

Moreover, one of the promisees, the present plaintiff, entering into a contract in respect of the estate when executor *de son tort*, has become administrator—thereby his acts as representative of the estate when such executor *de son tort* have become validated: *Kenrick v. Burges* (1583), Moore (K.B.) 126: *Hill v. Curtis*, L.R. 1 Eq. 90, 100—the promise made to him when he was executor *de son tort* (even though others were joined as promisees) he can take advantage of as administrator—he is considered as having been administrator from the beginning.

If the objection be taken that the promise was joint, the objection would not prevail to make the action a nullity—the Court

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should add the necessary parties in some capacity, with their consent in writing as plaintiffs, in which case the Statute of Limitations would be ineffective: *Thompson v. Equity Fire Insurance Co.* (1908), 17 O.L.R. 214, 221, 222, 236: not questioned on this point in *Equity Fire Insurance Co. v. Thompson* (1909), 41 S.C.R. 491, and the judgment affirmed (*sub silentio* as to this point), *Thompson v. Equity Fire Insurance Co.*, [1910] A.C. 592. If the others refuse, the proper practice is to add them as parties defendant: *Cullen v. Knowles*, [1898] 2 Q.B. 380; and then the statute would not matter.

In no case should the action be dismissed: *Roberts v. Evans* (1878), 7 Ch.D. 830; *Van Gelder Apsimon & Co. v. Sowerby Bridge United District Flour Society* (1890), 44 Ch. D. 374.

If the defendants really desire it, they may be protected by making the two other brothers parties.

In all other respects, I think the appeal should be dismissed, and with costs.

Appeal allowed; RIDDELL, J., dissenting.

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[APPELLATE DIVISION.]

CHARTERS v. McCracken.

Mechanics' Liens—Lien of Material-man—Validity—Mortgagee—Release of Equity of Redemption in Favour of—Registration of Deed before Liens Registered—Absence of Actual Notice—Priority—Registry Act, R.S.O. 1914, ch. 124, secs. 2 (c), 71—Mechanics and Wage-Earners Lien Act, R.S.O. 1914, ch. 140, secs. 14 (2), 21—Right of Lien-holder as to Portion of Mortgage-moneys not Advanced.

M. bought land from L., and built upon it; mechanics' liens arose out of the building, which was done for M. and on his credit; part of his purchase-money was unpaid, and he mortgaged the land for a further sum, the greater part of which he spent upon the building. The purchase and building were speculative, the speculation failed, and M. conveyed to L. all his interest in the land, in consideration of the purchase-money due and of L. assuming the mortgage made by M., at its full amount. Unregistered liens existed, but none was registered against the land until after the registration of the conveyance from M. to L.; and the latter had up to that time no actual notice of any of the liens:—

Held, applying the provisions of sec. 14 (2) of the Mechanics and Wage-Earners Lien Act, R.S.O. 1914, ch. 140, to the first transaction between L. and M., that L. was to be treated as if mortgagee and M. as if mortgagor of the land; and the later transaction had the effect of a release of the equity of redemption.

(2) That by the effect of sec. 71 of the Registry Act, R.S.O. 1914, ch. 124 (see sec. 2 (c)), and sec. 21 of the Mechanics and Wage-Earners Lien Act, L. had priority over the lien-holders, and the liens were ineffectual against him—except, it might be, as to such portion of the moneys secured by the mortgage assumed by him, at its full amount, as had not been actually advanced.

APPEAL by the plaintiff (a material-man) from the judgment of an Official Referee in an action to enforce a mechanic's lien. The Referee found the plaintiff entitled to a lien, but found also that certain of the defendants, mortgagees, had priority to a named extent, and ordered the plaintiff to pay the mortgagees' costs of proving their claims.

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February 15. The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and MASTEN, JJ.

A. J. Russell Snow, K.C., for the appellant, argued that, under sec. 14 of the Mechanics and Wage-Earners Lien Act, the plaintiff's lien was entitled to priority, and the learned Referee should have so decided. The defendant Lucas had notice of the existence of the lien before registering his conveyance. Lucas had visited the house every day as it was being built. He did not complain of the purchase by Armstrong, who was an innocent purchaser for value without notice.

R. J. Gibson, for the defendants Lucas and Armstrong, contended that Lucas had no actual notice of the lien when he registered the conveyance from McCracken to himself, and consequently he was entitled to priority under the provisions of sec. 72 of the Registry Act: *McVean v. Tiffin* (1885), 13 A.R. 1; *Richards v. Chamberlain* (1878), 25 Gr. 402; *Rose v. Peterkin* (1885), 13 S.C.R. 677, at p. 694.

D. Urquhart, for the defendants Newton, Fabian, and Alexander, said that they had mortgage-moneys in their hands, for which there were many claimants, and they were willing to pay them out as the Court might direct. If the liens were cut out as far as the deeds were concerned, they would be cut out as far as the mortgages were concerned. He also contended that the statute gave no lien on unpaid purchase-money. On the question of priority of registration cutting out the liens, he referred to *Hynes v. Smith* (1879), 27 Gr. 150; *Wanly v. Robins* (1888), 15 O.R. 474; *Cut-Rate Plate Glass Co. v. Solodinski* (1915), 34 O.L.R. 604.

Snow, in reply.

March 17. MEREDITH, C.J.C.P.:—Lucas, having a contract for the sale to him of the land in question, entered into a contract

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with McCracken to sell it to him. McCracken bought for speculative purposes: to build upon the land and then to sell it at a profit. He did build upon it; and the "mechanics' liens" in question arose out of that work, which was done for him and on his credit; \$1,300 of McCracken's purchase-money was unpaid; and, in addition to that, McCracken put a mortgage for \$1,300 upon the property; the money which he received upon this mortgage, nearly but not quite the full amount, being used by him in his building operations. The speculation proving a failure; and McCracken conveyed to Lucas all his interest in the land, in consideration of the \$1,300, due to Lucas, and of Lucas assuming the mortgage, made by McCracken upon the land, at its full amount.

No lien was registered against the land until some time after the later transaction between Lucas and McCracken had been carried out and the conveyance from McCracken to Lucas had been duly registered: and the Referee has found that Lucas had not actual notice of any of the liens until after the registration of his conveyance from McCracken.

In so far as the Mechanics and Wage-Earners Lien Act, R.S.O. 1914, ch. 140, is applicable to the first transaction between Lucas and McCracken, Lucas is to be treated as if mortgagee, and McCracken as if mortgagor, of the land (sec. 14 (2)); and so, if within the provisions of that enactment, the later transaction had the effect of a release by the mortgagor to the mortgagee of the former's equity of redemption in the land.

And, under the provisions of that enactment, the plaintiff and other lien-holders had unregistered liens upon the land existing when the later transaction between Lucas and McCracken took place; liens which still exist—having been duly registered in time—unless they are cut out by the registration of the deed from McCracken to Lucas: and the main question raised upon this appeal is: which has priority?

The Registry Act, R.S.O. 1914, ch. 124, sec. 71, makes void, speaking generally, against any subsequent purchaser or mortgagee for valuable consideration, without actual notice, every instrument affecting land, unless registered before the registration of the instrument under which the subsequent purchaser or mortgagee claims.

The interpretation clauses of the Registry Act (sec. 2) do

not provide expressly that the word "instrument" shall include mechanics' liens; but do provide (clause (c)) that it shall include "every other instrument whereby land may be transferred, disposed of, charged, incumbered, or affected in any wise:" and sec. 21 of the Mechanics and Wage-Earners Lien Act provides that, "where a claim is so registered the person entitled to the lien shall be deemed a purchaser *pro tanto* and within the provisions of the Registry Act and the Land Titles Act, but except as herein otherwise provided those Acts shall not apply to any lien arising under this Act." "So registered" means registered under the provision of the Mechanics and Wage-Earners Lien Act.

The effect of the two enactments seems to be, in such a case as this, that, if the lien-holder delays registration of his lien, he does so as the risk of being cut out under the provisions of the Registry Act. The lien may be registered before or during the performance of the contract or within 30 days after completion or abandonment of it; or before or during the furnishing or placing of the materials or within 30 days after the last of them is furnished or placed: see *McVean v. Tiffin*, 13 A.R. 1.

Though the circumstances of this case naturally arouse suspicion as to the good faith of the transaction which, if upheld, gives priority to Lucas, enough cannot be found in the evidence to warrant a reversal of the Referee's findings, that Lucas is a subsequent purchaser for valuable consideration without actual notice, and so, having registered his instrument first, the liens are ineffectual against him: except, it may be, as to the amount not yet advanced of the \$1,300 secured by the mortgage assumed by him at that amount: see *Ross v. Hunter* (1882), 7 S.C.R. 289; and *Rose v. Peterkin*, 13 S.C.R. 677.

If the lien-holders so desire, they may, within 10 days, have the matter referred back to the Referee to deal with all questions respecting the surplus mortgage-money: in other respects the appeal should be dismissed with costs.

This appeal covers also the case of another lot of land conveyed by McCracken to Armstrong, the validity and priority of which conveyance is not now questioned; the only thing in question being surplus mortgage-moneys in the same position as the surplus mortgage-moneys in Lucas's case. The dismissal of the appeal covers this branch of it as well as the other, as well as does the

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leave to have the question of surplus mortgage-moneys referred back.

LENNOX, J.:—The appeal is from the judgment of the learned Official Referee directing: (a) payment of \$658 for debt and \$40 for costs by the building owner, McCracken, to the plaintiff; (b) dismissing the lien-claims registered by the plaintiff and the Hall-Zyrd Foundry Company against the lands in question, and discharging the *lis pendens* registered in each case; (c) directing the plaintiff to pay the defendants Armstrong and Lucas the sum of \$17.50 each as costs; and (d) awarding the mortgagees the sum of \$25, costs of their defence—to be retained out of the balance of mortgage-moneys in the hands of their solicitors, Messrs. Urquhart & Page.

The plaintiff's claim, as an indebtedness of McCracken, for material going into the construction of the buildings in question, is not, as I understand it, disputed by anybody; and the Referee found as a matter of fact and law "that the plaintiff's lien was filed in time, that is, within 30 days after the last delivery; but I find," he says, "that the purchaser of the property, the present owner (Lucas), is an innocent purchaser for value without notice, and that all that the lien-holder is entitled to claim here is the unadvanced portion of the mortgage-money, which has been arranged to be paid into Court."

If the judgment had been settled and entered up in accordance with this finding, there might not be much ground for complaint by the plaintiff, but this has not been done. The formal judgment dismisses the lien-claims of the plaintiff and the Hall-Zyrd Foundry Company, and leaves the field open to other creditors of McCracken, who are seeking to obtain the unadvanced mortgage-moneys above referred to, through a receiver, on garnishee and attachment proceedings, and on orders given them by McCracken; and deprives the plaintiff of the protection which he is alleged to have by reason of sec. 14 of the Mechanics and Wage-Earners Lien Act (R.S.O. 1914, ch. 140), which provides that "the lien" (under the Act) "shall have priority over all judgments, executions, assignments, attachments, garnishments, and receiving orders recovered, issued or made after such lien *arises* . . . or after registration of a claim for such lien . . ."

The Hall-Zyrd Foundry Company have not appealed, and they need not be considered in the matter; but, the Referee having found a valid lien by the plaintiff—subject of course to the priority, as found, of Lucas, and the undisputed rights of the mortgagees and Armstrong—the company should at least be allowed to assert, and, if they can, establish, their priority in the unadvanced mortgage-moneys or *pro tanto* in the lands in question, with whatever advantage, if any, sec. 14 confers upon them as registered lien-holders. I express myself in this tentative way, because I have come to the conclusion that the matter must go back to the Referee, and it is not expedient that I should pronounce an *à priori* judgment upon matters with which he will have to deal.

This much I may say, however, without infringing the self-denying ordinance I have laid upon myself, namely, that it will perhaps be convenient to leave the mortgages at the amount for which they have been executed, \$1,300 each, if this can be done without prejudice to the rights of the plaintiff or other claimants, and perhaps at all events. Further that this, unadvanced money, or a *pro tanto* interest in the land, would appear to me, but I say no more, to belong to McCracken, subject to the rights of his creditors, according to their legal priorities under the Mechanics and Wage-Earners Lien Act or otherwise; that is not claimed by the mortgagees, and does not belong to them if the mortgages stand at their face value as a charge upon the land; and it does not belong either as land or money to Lucas or Armstrong, for they took in each case subject to a \$1,300 mortgage charge. It seems possible, therefore (and I refrain from being definite, for the reasons I have mentioned), that this intervening estate or interest, either as land or money, can be worked out so as to make it available either for the plaintiff and other lien-holders, if they have priority under sec. 14, or for creditors of McCracken, if they have not.

This is all, of course, subject to the question which is to be dealt with upon this appeal as to priority as between the plaintiff and Lucas, with which I will now deal. I am not clear as to whether the retained mortgage-moneys come exclusively from the mortgage upon the Lucas land, or partly from both mortgages, nor do I think it important, as the lien of the plaintiff is in respect of both properties, and Urquhart & Page represent both mortgagees. This matter can be adjusted by the Referee, if necessary.

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Except as to the question of working out lien-holders' rights, Armstrong is in no way concerned. It is admitted that he is a *bonâ fide* purchaser for value without notice; subject, I think, to a \$1,300 mortgage.

Now as to the priorities I have just mentioned. The finding that Lucas is a *bonâ fide* purchaser for value without notice is, I think, amply supported by the evidence. Both he and his solicitor gave positive and explicit evidence that they had no knowledge of the plaintiff's dealings with McCracken, or his claim, while the transaction with Lucas was being carried out, or until after the registration of his deed. The argument that Lucas was a preferred creditor is not well-founded. He had a lien for \$1,300 as an unpaid vendor, and allowed McCracken to raise \$1,300 on the property—pretty much all of which went into the buildings—and he purchased for the aggregate of these two sums, \$2,600. It is pointed out that Armstrong paid more than this, but it is not shewn that the properties were of equal value; and Armstrong may have paid too much.

The deed to Lucas was registered weeks before the registration of the plaintiff's claim of lien. I need not quote the provisions of the Acts; but a careful reading of the provisions of the Mechanics and Wage-Earners Lien Act and the Registry Act satisfies me that Lucas obtained priority over the plaintiff by priority of registration. This need not have been, of course. The plaintiff's claim arose long before this. He could have registered before Lucas, but did not do so. It is not, in my opinion, a question of when the claim arises, but the relative dates of registration that determines priority. The statute puts the means of protecting himself well within the reach of a lien-holder or supply-man, but the plaintiff did not avail himself, to the full measure, of its provisions.

The judgment should be varied by striking out the portion dismissing the plaintiff's lien and discharging the *lis pendens*, and the action referred back to the Referee for the purposes and in the terms of the judgment of the Chief Justice; and, as an appeal could have been avoided if counsel for the appellant had adhered to the position he took, at one time, of a claim upon the money only, the appellant should pay the costs of appeal.

RIDDELL and MASTEN, JJ., concurred.

Judgment below varied.

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COLLERAN v. GREER.

March 17.

Appeal—County and District Courts—Appellant Absent from Trial—Motion for New Trial—Forum—Appellate Division—Rule 499—County Courts Act, R.S.O. 1914, ch. 59, secs. 39, 40—Irregularity—Failure to Prove Claim—Order for New Trial—Costs.

Rule 499 of the Rules of the Supreme Court of Ontario is inapplicable to County and District Courts; the special provisions of secs. 39 and 40 of the County Courts Act, R.S.O. 1914, ch. 59, prevail; and an application to set aside a judgment given at the trial of an action in a County or District Court and for a new trial, where one of the parties did not appear, must be made to a Divisional Court of the Appellate Division.

In this case the judgment was set aside and a new trial ordered, upon the unopposed motion of the defendant, who had failed to appear at the trial; no order as to costs was made nor any terms imposed, because of a fatal irregularity at the trial, and because the plaintiff was not represented on the motion.

Proof of the plaintiff's claim must be given at the trial in Courts higher than the Division Courts.

APPEAL by the defendant Dunn from the judgment of the District Court of the District of Thunder Bay, in favour of the plaintiff, in an action to recover a balance of the price of goods sold to the defendant.

The judgment was given in the absence of the appellant, and he asked to have it set aside and a new trial ordered.

February 15. The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and MASTEN, JJ.

J. H. Spence, for the appellant, asked that the judgment below be set aside and a new trial granted, because his client had not been present at the trial, and judgment had been given by default. Being asked by the Court why he had not applied to a Judge under Rule 499, instead of coming to the Divisional Court, counsel submitted that that Rule did not apply to the case of an appeal from the judgment of a County or District Court, which appeal was regulated by secs. 39 and 40* of the County Courts Act, R.S.O. 1914, ch. 59.

The plaintiff was not represented.

*39. Any party to a cause or matter may appeal to a Divisional Court from any judgment directed to be entered at or after the trial or from a refusal to enter a judgment.

(2) A motion for a new trial shall be deemed an appeal, and shall be made to a Divisional Court.

Section 40 specifies a number of instances in which an appeal shall lie.

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March 17. The judgment of the Court was delivered by MEREDITH, C.J.C.P.:—The only doubtful question in this case is the question whether this application could not have been made in Port Arthur as well as here; if so, there would be no justification for the greater expense and greater delay in making it here, in so plain a case as this.

The application is one to have a judgment at a trial—given in the absence of the applicant and now entered up formally—set aside and a new trial had between the parties; and so in olden days would have been a County Court motion in term. But for a number of years past the practice in England has provided a better method, and that practice has been adopted here, and, as amended, is now contained in Rule 499: which provides that, where a party does not appear at the trial, the judgment may be set aside and a new trial ordered by the Judge presiding at the sittings, or by a Judge. By Rule 3(d), “Judge” shall mean a Judge of the High Court Division of the Supreme Court.

The question is, whether that practice applies to a County Court case, which this case is.

Rule 768 provides that the Rules, and the practice and procedure in the Supreme Court, shall, so far as the same can be applied, apply and extend to actions in the County Court: but again the provisions of the County Courts Act cover the subject of appeals from those Courts; and of course the provisions of the special enactment prevail if there be conflict between them and the general Rules.

The plain purpose of the provisions regarding appeals, contained in the County Courts Act, was to make all appeals, from such Courts, appeals to a Divisional Court; and no provision is made for any kind of an appeal or application to a County Court Judge: although under the earlier County Court enactments an appeal might have been so made; and a motion for a new trial must have been so made. So that the purpose of the Legislature, to remove all such motions and appeals from the local Courts and to require them to be made here, is plain; and must be given effect to, even if Rule 499 were not so ill-fitted to cover County Court cases as it is.

This case is plainly within both sec. 39 and sec. 40 of the County Courts Act; and so the motion is regularly here and must be dealt with.

Upon the facts disclosed in the affidavits and papers filed, the case is one in which, as a matter of indulgence, the judgment in question should be set aside and a new trial granted: and, beside that, the papers disclose an irregularity in the proceedings at the trial which vitiates the judgment.

At the trial, judgment was apparently given for the plaintiff for \$559.60 and costs, without evidence of any kind: it seems to have been based "upon hearing what was alleged by counsel for the plaintiff" only: that is in some cases permissible in Division Courts: see sec. 108 of the Division Courts Act, R.S.O. 1914, ch. 63: but proof of the plaintiff's claim must be given, at the trial, in the higher Courts.

The application is allowed; there will be no order as to costs, nor any terms imposed, because of the fatal irregularity at the trial; as well as because the respondent was not represented here.

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[APPELLATE DIVISION.]

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March 17.

LAMBERT V. CITY OF TORONTO.

Negligence—Death of Workman Employed by Electric Company—Negligent Arrangement of Wires—Electric Shock—Failure of Foreman to Warn Workman—Liability of Company—Dangerous Situation Created by Operations of City Corporation—Liability of Corporation—Findings of Jury—Indemnity—Contract—Relief over.

A workman employed by an electric company, at the bidding of the company's foreman, mounted a pole erected by the company upon a city street, and cut one of the wires of the company, in which there was a high-tension current. This pole had been moved by the company, by direction of the city corporation, to a place selected by the corporation; and the corporation had afterwards erected a pole not far from the company's pole and guyed it by a guy-wire running close to the company's pole, and wound round the corporation's pole, in contact with a lightning-arrester. There was an insulator on the guy-wire, but it was not between the two poles. The workman's body coming near the corporation's guy-wire, a grounding was effected through his body, the guy-wire, and the lightning-arrester—the current passed through him, and he was killed. His mother brought this action, under the Fatal Accidents Act and the Workmen's Compensation for Injuries Act, against both the corporation and the company, to recover damages for his death. At the trial, the jury found negligence on the part of both defendants, and no contributory negligence:—

Held, that the jury were justified in finding negligence against the company, through its foreman, who should have known of and warned the deceased of the arrangement of the wires, which he said was a trap; and the company was properly held liable.

Held, also, that the city corporation was properly found to have been negligent, for it had created the dangerous situation, after having directed the removal of the company's pole and impliedly consented to the company's

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men going up the pole for necessary purposes; and it also was rightly held liable.

In the contract between the company and the corporation, it was provided that the company should indemnify the corporation against any action or demand brought or made by the granting of any privileges to the company, and also against all loss or damage which the corporation might incur by reason of the improper or imperfect execution of the company's works, or by reason of their becoming unsafe or out of repair, or by reason of the failure of the company to do or permit anything agreed to be done or permitted, or by reason of any act, default, or omission of the company or otherwise howsoever:—

Held, assuming that the workman's rights must be limited to those of the company, and that he must be barred if the company could not sue, that the case did not fall within this indemnity clause: the corporation was made liable in this action, not by reason of anything done or left undone by the company, but by reason of the corporation's own negligence in changing a safe arrangement into an unsafe one; and the same considerations applied to the claim for indemnity made by the corporation against the company.

Judgment of MULOCK, C.J.Ex., affirmed; MEREDITH, C.J.C.P., dissenting in part.

Per MEREDITH, C.J.C.P.:—The judgment against the defendant municipal corporation could not stand: because (1) it owed no duty to the workman who was killed; and (2), if it did, the breach of it was not, but the negligence of the foreman of the company, the man's master, was, the proximate cause of the accident; and (3) because the man was guilty of contributory negligence as against the defendant municipal corporation.

The judgment against the defendant company was right and should stand, not only on the ground upon which the jury put it, but because the company, the man's master, which was bound to take reasonable care of him in its employment, instead of doing so, entered into an agreement with the corporation exempting it from liability to the company and its workmen acting under that agreement.

If the defendant corporation should be held liable to the plaintiff, its co-defendant was bound to indemnify it against such liability.

Sutton v. Town of Dundas (1908), 17 O.L.R. 556, distinguished.

APPEALS by the two defendants, the Corporation of the City of Toronto and the Interurban Electric Company, from the judgment of MULOCK, C.J.Ex., of the 8th November, 1915, in favour of the plaintiff against both defendants, upon the findings of the jury at the trial at Toronto, in an action brought by Ada Lambert, mother of Kenneth Lambert, to recover \$10,000 damages under the Fatal Accidents Act and the Workmen's Compensation for Injuries Act, for the death of her said son, caused by coming in contact with the electric wires of the defendants, on the 13th March, 1914.

The judgment appealed from awarded the plaintiff \$2,700 damages and costs of the action; claims for indemnity made by each defendant against the other were dismissed without costs.

The city corporation appealed against the judgment dismissing its claim for indemnity over against its co-defendant.

February 18. The appeals were heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and MASTEN, JJ.

C. M. Colquhoun, for the appellant city corporation, argued that the judgment against the corporation was wrong, because, if it was guilty of negligence at all, such negligence was not the proximate cause of the accident; the proximate cause was the negligence of the foreman of the Interurban Electric Company, who should have apprehended danger from the position of the strain insulators. As against the city corporation, the deceased had been guilty of contributory negligence. If the city corporation should be held liable to the plaintiff, the Interurban Electric Company was bound to indemnify the city corporation under the agreement between them. The right of the workman was not higher than that of the company employing him, and the latter could not have sued by reason of the contract of indemnity.

D. Inglis Grant, for the appellant company, contended that the findings of the jury did not disclose any actionable negligence on the part of the company causing the accident. It was the corporation which had been negligent in the dangerous arrangement of its guy-wire. The corporation's consent to the company's men going up the pole was implied from the necessities of the work they were required to do. The case was not one which came within the indemnity clause at all, as the corporation's liability depended not on anything which the company did or did not do, but on the corporation's own negligence: *Sutton v. Town of Dundas* (1908), 17 O.L.R. 556.

B. N. Davis, for the plaintiff, respondent. It was a question for the jury whether there was or was not negligence; and the jury had found both defendants liable. On the findings the judgment had been based, and should not be disturbed.

March 17. RIDDELL, J.:—This is an appeal by the City of Toronto and the Interurban Electric Company against a judgment in favour of the plaintiff for \$2,700 and costs: and by the city against a judgment dismissing its claim for indemnity over against the Interurban Electric Company—the case having been tried before the Chief Justice of the Exchequer and a jury at the Toronto Assizes.

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The jury answered certain relevant questions, and it is not disputed—nor can it be—that there is evidence upon which the jury could so find. Adopting then the answers of the jury as to the facts in dispute, the case is as follows.

The predecessors in title, &c., of the Interurban Electric Company had a contract with the predecessors in title, &c., of the city, under which they erected a pole not far from the north-west corner of Bathurst street and St. Clair avenue. This pole and its brethren were to support a wire or wires for the carriage of electricity of high tension; and, in the nature of things, it would be necessary for employees of the electric company to mount the pole to examine, adjust, repair, &c., the wires.

The city absorbed the street on which this pole was placed, and, on the 9th November, 1912, required the Interurban Electric Company to move it some feet back and behind the kerb—and this was done.

After this, the city itself erected a pole not far from that of the Interurban Electric Company—guyed it by a guy-wire running close to the Interurban pole and wound round the city's pole. With unaccountable negligence, this guy-wire was wound round the city's pole in contact with a lightning-arrester, i.e., a wire running down the pole longitudinally into the earth—a wholly improper and dangerous arrangement, and one which could have been avoided by the very common practice of inserting wooden blocks between the two wires.

Even this dangerous arrangement might have been rendered innocuous (so far as the Interurban was concerned) by the introduction of an insulator close to the city's pole. There was an insulator on the guy-wire, but it was not between the two poles.

On the day in question, the 13th March, 1914, the deceased Lambert, a young man in the employ of the Interurban Electric Company, was directed by his foreman, Cameron, to mount the Interurban pole and "release" certain wires. He did so, cut an Interurban wire in which there was a high-tension current, and, his body coming near the city's guy-wire, a grounding was effected through his body, the guy-wire, and the lightning-arrester—the current passed through him, and he was killed. His mother brought an action under Lord Campbell's Act and the Workmen's Compensation for Injuries Act, the city claimed indem-

nity, and the case came on for trial before the Chief Justice of the Exchequer, with a jury in the plaintiff's case, without a jury on the question of indemnity.

The following are the questions and answers:—

"1. What was the cause of the accident? A. The accident was caused by Lambert's left heel coming in contact with the Interurban wire, and his left side touching the guy-wire, which was in contact with the ground-wire on the Hydro-Electric pole.

"2. Was the Corporation of the City of Toronto guilty of any negligence which caused the accident? A. Yes.

"3. If yes, in what did such negligence consist? A. By not having the strain insulators nearer the Hydro-Electric pole, and by not insulating the point of contact between the guy-wire and the ground-wire or lightning arrester on the Hydro pole.

"4. Was the Interurban Electric Company guilty of any negligence which caused the accident? A. Yes.

"5. If yes, in what did such negligence consist? A. Before sending Lambert up the pole, the Interurban foreman should have noted that the strain insulators near his company's pole were in wrong position, and, that being so, should have directed his attention to the possibility of the guy-wire being in contact with the ground-wire on Hydro pole.

"6. Was the deceased guilty of any negligence which caused or contributed to the accident? A. No.

"7. If yes, in what did such negligence consist? (No answer).

"8. What damages, if any, do you award the plaintiff? A. \$2,700, \$1,800 to be borne by the Hydro-Electric Company and \$900 by the Interurban Electric Company.

(This was changed by the jury to a simple statement of the amount, \$2,700).

"9. What do you estimate to be the amount of the earnings during the three years preceding the accident of a person in the same grade as that of the deceased in the like employment within the Province of Ontario? A. \$2,700.

"10. Was the Interurban pole erected before or after the Hydro guy-wires were carried from the Hydro pole to the anchor post on the east side of Bathurst street? A. Yes. The Interurban pole was erected first. (This was in reference to a contention

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by the city that the city pole was in position before that of the Interurban Electric Company).

So far as the Interurban is concerned, I think the jury was amply justified in finding negligence against it, through its foreman, Cameron. He himself says that the arrangement of wires, &c., was a trap; the reason he did not warn Lambert was that he did not see it himself and his not seeing it was "an overlook."

As regards the city, the Interurban Electric Company, at the request of the city, placed its pole at a certain point of the city's property—the pole remaining the Interurban Electric Company's personal property—the consent to the company's men going up the pole for all necessary purposes was implied, if indeed such consent was needed for the company to have its own men mount its own pole for its necessary work. The condition of affairs is perfectly safe, when the city, for its own purposes, throws a wire across near to the pole and creates a situation of danger for all persons mounting the pole and doing certain of the company's necessary work: and does this, knowing that persons are to be expected to do such work. I cannot see why the city is not to be held liable to the workman.

It is argued that the right of the workman is not higher than that of the company, and that the company could not have sued, by reason of its contract of indemnity.

Assuming, without admitting, that the workman's rights must be limited to those of the company, and that he must be barred if the company could not sue, how does the case stand?

The clause reads: "7. The company shall save harmless and indemnify said corporation against any action, claim, suit or demand brought or made by the granting of any of the privileges hereinbefore mentioned to the company, and all costs and expenses incurred thereby, and also against all loss, damages, costs, charges, and expenses of every nature and kind whatsoever, which the corporation may incur, be put to or have to pay, by reason of the improper or imperfect execution of their works or any of them, or by reason of the said works becoming unsafe or out of repair, or by reason of the neglect, failure, or omission of the company to do or permit anything herein agreed to be done or permitted, or by reason of any act, default, or omission of the company or otherwise howsoever."

The city is made liable in this action, not by reason of anything done or left undone by the company, but by reason of the city's own negligence in changing a safe arrangement into an unsafe one; as it seems to me, the city might as well claim an indemnity if its men were negligently to chop down one of the company's poles with a man on it.

I agree with the Chief Justice of the Exchequer that this case does not come within the indemnity clause: therefore, in any case, the city has no answer against the claim of the plaintiff.

The same considerations apply to the claim of the city against the Interurban Electric Company.

I am of opinion that the appeals should be dismissed with costs.

LENNOX, J.:—The questions to be determined upon the appeals and cross-appeal are:—

(a) Is the plaintiff entitled to judgment against both or either of the defendants?

(b) Is either defendant entitled to be indemnified by the other?

Each of the defendants maintained an electric pole at the north-west corner of St. Clair avenue and Bathurst street, in this city. The Hydro pole, that is, the one maintained by the city, was west of the Interurban pole. The guy-wire from the Hydro pole extended easterly across Bathurst street and quite close to the Interurban pole. This guy-wire was fastened to the Hydro pole in a way to come in direct contact with its ground-wire. There were insulators upon the guy-wire, but none between the Interurban pole and the Hydro-Electric pole. The jury exonerated the plaintiff's husband from negligence. [The learned Judge then set out some of the questions put to the jury and their answers, already stated by RIDDELL, J., *supra*.]

It is difficult to see how the city can claim either exoneration from liability or indemnity—the city is the primary wrong-doer. The Hydro-Electric had to place its poles where directed by the city, and in this instance had to move the pole to this point from where it formerly stood. After the pole was put in the position assigned, the city was guilty of the grossest kind of negligence, not only in fastening its guy-wire so as to come in contact with the ground-wire, but in running it almost in contact with the cross-

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arms of the other system, and failing to insulate it properly. I do not agree with the argument that the company's foreman should have apprehended danger from the position of the strain insulators. The insulators were for the purpose of intercepting a current from an overhead wire falling upon the guy-wire. I would not have thought that the foreman could properly be charged with negligence in failing to discover that the guy-wire was placed in direct contact with the ground-wire; and this was the direct cause of the man's death. No one would expect to find such an astonishing piece of improper and negligent construction.

But negligence is a question for the jury, and they have found against both defendants. Both defendants are liable.

Subject to the question of the effect of the contract between the defendants, the question of contribution or indemnity is settled by *Sutton v. Town of Dundas*, 17 O.L.R. 556 (C.A.) On the finding of the jury, they were both wrong-doers. There was an agreement to indemnify the municipality in the *Sutton* case, too, and I think as broad and general as the one here; but, short of practical identity, each case is to be decided on its own facts.

There are two things covered by the agreement: (a) To indemnify the city against loss occasioned by granting the privileges of the agreement to the company. There has been no loss under this head. (b) Loss occasioned to the city by imperfect execution of the company's works, or their becoming unsafe or out of repair, or by reason of the company failing to do something they agreed to do or permitting something they were not to permit—or otherwise howsoever. The "or otherwise" carries the guaranty no further than the provisions preceding it.

The company has not broken its agreement under this part of paragraph 7. Its works have not been shewn to have been imperfectly executed or out of repair. True they became unsafe through the direct misconduct of the city's servants. This cannot be pleaded for the advantage of the city.

The appeals should be dismissed with costs.

MASTEN, J., concurred.

MEREDITH, C.J.C.P.:—Some of the most significant circumstances of this case seem to have been passed over at the trial unobserved, or, if observed, without being commented upon.

The case seems to have been treated there as if one of joint wrongdoing on the part of the two defendants; and so much so that the jury's verdict, for a different amount against each, was added together, and, without any concurrence of the jury, was entered as if against the defendants alike in the whole amount. There the case was treated as if there were liability in both of the defendants at common law, and the questions were framed accordingly, with the exception of one question relating to the amount of damages, though the judgment against the defendant the Interurban Electric Company can be supported only under the Workmen's Compensation for Injuries enactment. And, that which may be a circumstance of the greatest importance, the fact that neither the defendant the Interurban Electric Company, nor any of its employees, had any right to be at the place where the accident happened, engaged in the work they were doing when it happened, except by the leave of the defendant the municipal corporation—that without such leave they would be but trespassers there, and that they were there under such leave granted, not only upon the terms that the defendant the municipal corporation should not be liable to the company for any damages, but that the company should indemnify the municipal corporation against any action or claim brought or made by the granting of such leave to the company, or by reason of any act, default, or omission of the company or otherwise howsoever—seems to have been quite overlooked or ignored.

Bearing these things in mind, let us now see what facts the jury have found, and what liability, if any, can be based upon them. The jury have found that the defendant the municipal corporation was negligent in leaving one of its stay or "guy" wires resting upon the lightning-rod of one of its line of transmission poles, and that the accident was caused by reason of the "strain insulator" of the stay-wire being outside the transmission pole of the defendant the Interurban company, upon which the accident happened, instead of between it and the other pole: but that that negligence would have been harmless except for the negligence of the defendant the Interurban company, through its foreman in charge of the work being done, in not observing the danger and warning the man who was killed of it: or, as it would probably have been put had it been observed, that there could be recovery

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against the defendant the Interurban company under the Workmen's Compensation for Injuries enactment only: the negligence of a person in the service of this defendant, to whose orders the man was bound to conform and did conform; the injury resulting from his having so conformed.

Upon these findings, quite apart from the leave, and the terms upon which it was granted, it is quite obvious that the defendant the Interurban company could have no cause of action against its co-defendant. Its negligence was the immediate cause of the man's death: its act in sending him into danger without warning him, as the jury have found. The passive negligence of the defendant the municipal corporation was harmless to those taking due care. Then can a servant of the defendant the Interurban company, so injured, have any higher right against its co-defendant than his master had—having regard to the fact that he was there under and upon the conditions of the leave granted, and otherwise would have been a mere trespasser without any right of action for any such negligence as the jury have found: though he doubtless would have a good cause of action against his employer under the Workmen's Compensation for Injuries enactment? See *Grand Trunk R.W. Co. v. Robinson*, [1915] A.C. 740; *Jones v. Morton Co. Limited* (1907), 14 O.L.R. 402, at p. 414; and *Dominion Natural Gas Co. v. Collins*, [1909] A.C. 640.

Now let us look at the material facts of the case, those upon which the jury were questioned, as well as those upon which they were not. The plaintiff's earnest efforts to aggravate the character of the negligence of the defendant the municipal corporation, is something in the nature of a two-edged sword—the grosser it was, the less excuse there can be for not avoiding it. But, whatever its character may have been, it was far removed from such negligence as that which places in the reach of the innocent and ignorant a dangerous weapon or instrument. The wire in question was at the top of the pole of the defendant the Interurban company, entirely beyond the reach of every one but skilled line-men going there to perform their duties in connection with electric street wiring, duties performed at or near the top of such poles and in a net-work of wires carrying electricity, a place and a work necessarily dangerous to any one not taking all the precaution his trade and experience had taught him that he could take for his

own safety. The taller pole, of the defendant the municipal corporation, and the shorter one, of its co-defendant, were quite near to one another: the taller pole carried a lightning-rod—a “lightning-arrester,” as the men engaged in such work prefer to call it: but, by whatever name it may be called, it was simply and plainly a lightning-rod, running all the way down the pole, and into the ground, on the side of the pole towards the sidewalk: in contact with this lightning-rod was the stay-wire in question, and the near insulation in it was just the other side of the shorter pole: the effect of that being that the “lightning-arrester” was extended so that it protected both poles; if lightning were attracted to the taller pole, it would, instead of doing injury, be carried down the lightning-rod into the ground: if attracted to the smaller pole, instead of striking it and doing injury, it would be carried by the stay-wire to the lightning-rod and down that rod to the ground harmlessly. And, apart from nature’s interference, in thunder-storms, the rod and the wire were perfectly dead and harmless, unless by some human agency they were brought in contact with some electric current, and on that being done would carry the current safely and harmlessly into the ground. The “lightning-arrester” was a needful safety appliance properly placed for the protection of these transmission wires, as well as of the public making lawful use of the highway: in order that that safeguard might be had, it was necessary that the poles upon which it was placed should be more dangerous to careless workmen upon them than if there were no such general safety device: and it is quite obvious that the danger would have been greater to a careless workman on the pole of the defendant the municipal corporation, than on the pole of its co-defendant, because the “ground-wire” or “lightning-arrester” ran all the way down the former pole, whilst the extension of it, by means of the stay-wire, merely passed by the top of the other pole. All of which means, that the man was working under obvious and ordinary conditions, and could not have been injured except by making himself a connection between some live wire and this dead ground-wire or the pole or some of the other wires upon it. I have said “obvious conditions,” and they were so obvious that the jury found the foreman guilty of negligence causing the man’s death, because, although standing on the ground, not up the pole

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or otherwise nearer the stay-wire, he did not warn the workman of the danger. The condition of affairs was made more obvious by the strain insulator, a very conspicuous thing, so conspicuous and so placed that none but the quite blind could help seeing it; and seeing that it afforded no protection from the side towards the longer pole, which was only a few feet away from the shorter one. As the jury put it, the "wrong position" of the strain insulator should have been noticed and should have been a warning of possible danger from the longer pole. And, that being so, how is it possible to exculpate the workman from negligence, causing the accident, except upon the ground, acted upon in the House of Lords in the case of *Smith v. Baker & Sons*, [1891] A.C. 325, that the man was acting not voluntarily but under the compulsion of his service; or, as put in the Workmen's Compensation for Injuries enactments, he was conforming to orders to which his service compelled him to conform?

Then, proceeding a step further, what was it that really caused the accident? The man cut, in pursuance of his orders, the two heavy transmission wires, carrying an electric current of 2,200 volts, 110 volts being the power ordinarily in use for all household purposes: he cut, and left exposed, these exceedingly dangerous live wires, wires attached to the lower cross-arm upon the shorter pole, some distance below the stay-wire at the top of this pole. The man's obvious main duty was to keep quite clear of these high power wires, which he had thus exposed and left exposed. Any kind of contact with them involved danger: the pole itself upon which the man stood might be in such a condition as to cause the man's death if, necessarily being in contact with it, he should touch the live wire: it is said that the pole was dry and would not have been a sufficient conductor to have caused serious injury: but it was in the month of March, and no one knows; and it was the man's duty to avoid any chances, and doubtless he meant to avoid them. Then he was in the midst of wires, some of which might have been as deadly as the ground-wire if the man unfortunately made of his body a connecting link between it and one of the live wires which he had exposed and left exposed—they were the sole starting-point of danger: the man knew, as every one knows, that no insulator can be always perfect, and that this applies especially to strain insulators. By some

terrible mishap, the man seems to have brought one of his feet in contact with one of the wires he had exposed, at the same time having some part of his body in contact with the stay-wire, and so made of his body the connecting link through which the 2,200 volt current or some part of it passed, killing him. At all events that is the finding, and it was the most probable cause; though there can be no direct evidence of it, and it is possible that the current passed down the pole he was on, or through some other wire with which he was in contact. That touching the live wire was the one thing the man should have avoided, and doubtless meant to avoid, is manifest. In some unaccountable way he failed in his purpose, and consequently met his death: a thing improbable, in the same circumstances, even once in a thousand times I have no doubt: but it happened this time.

Now, in these circumstances, what duty did the defendant the municipal corporation owe to this man? My answer is: only that which is covered by its contract with his master: and that is nothing, the obligation is altogether on the part of his master: and, as I have said, except under that contract the man would be a trespasser where he was. And, there being this expressed obligation, can there be any other? The plaintiff cannot contradict or vary it.

If it be not so, then upon what ground can the plaintiff recover against the defendant the municipal corporation? Not on the ground that if one place a loaded weapon where any fool may take it and do mischief with it he is answerable for mischief so done; because no such instrument is involved in this case; and, if there were, it was placed where none but experienced men could come in reach of it, and it was openly and obviously as dangerous as it could in any circumstances be. The experienced man, on the shorter pole, was within a few feet of the strain insulator, on one side of him, and of the longer pole and its lightning-rod, with stay-wire necessarily embedded, to some extent, in it, by the strain, and unnecessarily in contact with the lightning-rod, on the other side; so near to each that unless he closed his eyes he could not avoid seeing and understanding the actual, and the whole, condition of affairs. The loaded weapon principle is quite out of the question.

Then does the principle of a duty arising from an invitation

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apply? How can it when the invitation is in writing and lays down its own terms? Besides, if an invitation, it was an invitation to a place of danger; and the danger was open and seen, or else not seen because of gross negligence—going to a place of danger and shutting the eyes whilst in it.

Nor is the principle given effect to in such cases as *Rylands v. Fletcher* (1868), L.R. 3 H.L. 330, or the mischievous animals cases, at all involved in such a case as this. Both defendants were engaged in supplying the public with what may now be called one of the necessities of life; and supplying it by means which are quite safe, generally speaking; safer than many other public needs, such, for instance, as rapid traffic. And there was no outbreak of a dangerous element or a wild nature; the man who was injured made the danger, and then needlessly stepped into it.

It is quite difficult to extract from such cases as, on the one hand, *Earl v. Lubbock*, [1905] 1 K.B. 253, and *Winterbottom v. Wright* (1842), 10 M. & W. 109, and, on the other, *Langridge v. Levy* (1837), 2 M. & W. 519, *Levy v. Langridge* (1838), 4 M. & W. 337, and *Parry v. Smith* (1879), 4 C.P.D. 325—see also *Burrows v. March Gas and Coke Co.* (1870-2), L.R. 5 Ex. 67, and L.R. 7 Ex. 96—any clearly defined principle easily applied to every case; nor is there any need, for the purposes of this case, to attempt to do so; all of such cases being the very opposite of this case. In all of them there was a contract on the part of the defendant, and a contract broken by him, and a breach which was the direct cause of the plaintiff's injury. In those cases in which there was held to be liability to a person not a party to the contract, the liability was based upon the fact that a known to the defendant dangerous thing was, knowingly, placed by him in the hands of an innocent person ignorant of the danger. Pigott, B., in the case of *George v. Skivington* (1869), L.R. 5 Ex. 1, put it in this plain manner: "The case, no doubt, would have been very different if the declaration had not alleged that the defendant knew for whom the compound was intended. Suppose, for example, the chemist sells to a customer a drug, without any knowledge of the purpose to which it is to be applied, which is fit for a grown person, and that drug is afterwards given by the purchaser to a child and does injury, it could not be contended that the chemist was liable." The subject is also dealt with in his usual full and clear

manner by Parke, B., delivering the considered judgment of the Court of Exchequer in the case of *Longmeid v. Holliday* (1851), 6 Ex. 761.

In the case of *Parry v. Smith*, 4 C.P.D. 325, which I have been unable to trace further than its trial, Lopes, J., said (p. 327): "I think the plaintiff's right of action is founded on a duty which I believe attaches in every case where a person is using or is dealing with a highly dangerous thing, which, unless managed with the greatest care, is calculated to cause injury to by-standers. To support such a right of action, there need be no privity between the party injured and him by whose breach of duty the injury is caused, nor any fraud, misrepresentation, or concealment; nor need what is done by the defendant amount to a public nuisance. It is a misfeasance independent of contract."

But the case the learned Judge was dealing with was one of a contract, a breach of which caused injury to the servant of the other party to the contract, who would, undoubtedly, have had a right of action under the contract for the injury done to him in injuring his servant; and much of the opinion I have quoted conflicts with what is said in other cases of higher authority. And of course the claim in the case of *Parry v. Smith* could be easily sustained on narrow grounds: if the plumber had not only let the gas escape, but had exploded it too, he would obviously have been liable for the injury done; and the mere fact that he did not himself apply the light which caused the explosion could make no great difference, that light being applied without any kind of negligence, but in the ordinary course of the duty of the man who carried it; and, the explosion being the very thing that was likely to happen, it is difficult to understand why the plaintiff might not recover. If the plumber had puffed tobacco fumes in the man's face, he would have done to him a wrong; the more so puffing—in either case intentionally or unintentionally—explosive gas all around him; and the explosion and injury were direct consequences which the plumber must have known would be likely to follow upon his wrongful act.

One of the later cases was also a case of explosion of gas—*Dominion Natural Gas Co. v. Collins*, to which I have already referred. That too was a case of contract to do work; and a breach of that contract resulting in explosion, a human death, and bodily

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injury. The defendants the Dominion Natural Gas Company had contracted with the masters of the man who was killed and of the man who was injured, to bring into a building of the masters, in which men worked, and in which there was an exposed fire, natural gas to be used for power, heat, and light in that building, contracted to do the work and supply the gas in a workmanlike and proper manner; but, in breach of that contract, left the work in such a manner that an apparently necessary provision for the discharge of an overflow of gas was made in the building, where it might possibly be disastrous, instead of spending a few shillings in extending the discharge pipe to the outside of the building. The jury found that this breach of contract caused the accident, and that there was no contributory negligence on the part of the men. So far a simple and plain case: but the jury also found that the masters were also guilty of negligence in having tampered with the appliances through which the gas escaped, and that that negligence was the cause of the accident. By some process of reasoning, in which I could not agree, but which I cannot from memory recall, and the case does not seem to have been reported here, the provincial Courts gave effect to the jury's findings against the Dominion Natural Gas Company, but overruled, or disregarded, their findings against the masters, and no appeal was taken against the dismissal of the action as against them, so that, when the case reached the Judicial Committee of the Privy Council it was one of "Hobson's choice:" sustain the judgment against the Dominion Natural Gas Company, or else let the unfortunate plaintiffs go without anything, because of error in the provincial Courts, though the plaintiffs were plainly entitled to relief against one or other, if not both. The Judicial Committee proved themselves able to rise to the occasion, sustaining the judgment against the Dominion Natural Gas Company, by in effect reversing the verdict of the jury against their co-defendants, though there plainly was evidence upon which reasonable men could find as the jury had on this branch of the case. As put by the Judicial Committee, the question was whether the proximate cause of the accident was the negligence of the Dominion Natural Gas Company, in providing for escape of gas inside, instead of outside, the building, or was it the "conscious act of another volition," or, to come to the point more pointedly, was it the tampering with

the gas plant by the men of the masters, permitted by the masters? Notwithstanding the findings of the jury, the Judicial Committee considered that that question was left in doubt, and that the onus of proof of it was upon the Dominion Natural Gas Company, and so they did not escape. Let me read their own words upon this branch of the case ([1909] A.C. at p. 647): "That being so"—the Dominion Natural Gas Company having been found guilty of negligence—"have" they "been able to shew affirmatively that the true cause of the accident was the conscious act of another volition, i.e., the tampering with the machines by the railway company's"—the masters—"workmen?" The jury had very plainly said, yes; the Judicial Committee said, not proven. And it was a case of trial by jury. There is no appeal in the Courts of this Province from the jury to any Judge or Court: trial by jury is a statutory right.

As I have said, none of these cases is at all analogous to this case; but, if the last one were, the jury in this case have found as reasonable men not only could find, but could not help finding, that the accident was caused by the "conscious act of another volition," or, in other words, another act caused by human will; the negligent order of the foreman to the workman to do that which was done, in the open face of the whole danger which the defendant the municipal corporation had created, not on the property of another, but upon property vested in it and of which it was the conservator—a highway.

But it all comes back to the starting-point: the workman had a right to be where he was only upon the leave granted to his master by its co-defendant: and that leave was not only conditional upon no liability being incurred by the one who granted it, but also that it should be indemnified against any claims arising out of the granting of it.

I decline to waste time discussing cases in which the defendant the municipal corporation would be obviously a wrong-doer and the only wrong-doer: no one has any right wilfully to harm even a trespasser: no one has a right to lay traps: but such things are quite out of the question in this case: there was nothing like a trap; the whole condition of affairs was open and plain; no one could mistake it; that is, no one who had any right to climb these poles and go among these highly charged electric wires.

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Although the workman may be excused, and may not have been guilty of contributory negligence towards his master, because of the compulsion of his service, no such excuse can be raised in his behalf as to the other defendant, because he was under no order and no compulsion from it; his action must fail as against it on this ground also—his negligence, his causing of the whole trouble; the finding in his favour in that respect is doubtless good as to his master, but not as to its co-defendant; if it were intended to apply to it, the question should have been put plainly as to each, and the difference between a master's and a stranger's position have been plainly pointed out.

I am therefore of opinion that the judgment against the defendant the municipal corporation cannot stand: because (1) it owed no duty to the workman who was killed; and (2), if it did, the breach of it was not, but the negligence of the foreman of the man's master was, the proximate cause of the accident; and also (3) because the man was plainly guilty of contributory negligence as against this defendant.

And I am of opinion that the judgment against the other defendant is right, and should stand, not only on the ground upon which the jury put it, but also because the workman's master, which was bound to take reasonable care for him in its employment, instead of doing so, entered into an agreement with the defendant the municipal corporation exempting it from liability to it and its workmen acting under that agreement; and, that being so, what more does the plaintiff need?

And, if the defendant the municipal corporation should be held to be liable to the plaintiff, I am of opinion that its co-defendant is bound to indemnify it against such liability, for the reasons I have already given: and I am quite sure that the case of *Sutton v. Town of Dundas*, 17 O.L.R. 556, does not stand in the way of giving such relief. That case was the opposite of this case: the defendants seeking indemnity there were the "prime wrong-doers;" it was doubtful indeed if their co-defendants were really blameable for the accident: and there is no kind of likeness between the contract of indemnity in that case and that in this case. In this case the indemnity is against all claims and actions arising out of the leave granted, the leave to the defendant the Interurban company to be, and to maintain the

poles and wires, there in the highway vested in its co-defendant; or by reason of any act, default, or omission of that company or otherwise howsoever. In the case of *Sutton*, it was said (p. 567) that "the right to relief, under the agreement, is limited to cases in which the damages and expenses are 'incurred by or consequent on the negligence of' their co-defendants: it does not cover, and could never have been intended to cover, cases in which the municipal corporation's negligence is the direct and prime cause of the injury . . . and expenses." This case is very much more like such cases as *Pyman Steamship Co. v. Hull and Barnsley R.W. Co.*, [1915] 2 K.B. 729; *Travers & Sons Limited v. Cooper*, [1915] 1 K. B. 73; and *Manchester Sheffield and Lincolnshire R.W. Co. v. Brown* (1883), 8 App. Cas. 703: and, in the face of these decisions, and indeed without them, how can it be said that the words "any act, default, or omission of the company or otherwise howsoever," do not mean that which they so plainly say: quite apart from the other very broad words of the indemnity contract which I have more than once read, and which also plainly, as it seems to me, give the right of indemnity claimed by the defendant the municipal corporation against the prime sinner in, and direct causer of, this accident, its co-defendant?

But the other members of the Court are of a different opinion, and consequently the appeals must be dismissed on all grounds.

Appeals dismissed; MEREDITH, C.J.C.P., dissenting in part.

[KELLY, J.]

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Husband and Wife—Profits of Business of Wife Managed by Husband—Liability to Satisfy Judgment Recovered against Husband—Druggist's Business—Qualification of Husband as Registered Pharmacist—Pharmacy Act, R.S.O. 1914, ch. 164—Separate Property of Husband in Hands of Wife—Trustee—Account—Action by Judgment Creditor and Assignee—Champtuous Agreement—Right of Judgment Creditor to Recover.

Where a man is associated with a business said to be his wife's, the question whether he is her agent, or whether the business belongs to him, is one of fact; and the test is, whether the wife is trading independently of her husband without being accountable to him for the profits of the business. The mere fact that a married woman engages the services of her husband in the management of, or as an employee in, her separate business, does not of itself entitle him to a proprietary interest in it or in its proceeds;

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nor are the profits which arise from his labour or skill, by the simple fact of such engagement or employment, deprived of the character of separate estate of the wife, or rendered subject to the claims of his creditors.

In this case, the husband, who was a registered pharmacist, managed for his wife, a drug and stationery business, carried on in her name, which she had purchased, paying therefor with her own money and money made in carrying on the business, the husband receiving from her a salary of \$10 a month, under the terms of an agreement in writing. The drugs sold bore a label with the husband's name and the words "chemist and druggist" upon it:—

Held, in an action to enforce against the profits of the business a personal judgment recovered against the husband, that, upon the evidence, the design of the husband and wife was not to place the husband's property out of the reach of his creditors, but to keep the wife's property out of their reach; and that the plaintiff's claim failed except in one particular.

Laporte v. Costick (1874), 31 L.T.R. 434, *Harrison v. Douglass* (1877), 40 U.C.R. 410, *Meakin v. Samson* (1878), 28 U.C.C.P. 355, *In re Gearing* (1879), 4 A.R. 173, and *Campbell v. Cole* (1884), 7 O.R. 127, distinguished. *Murray v. McCallum* (1883), 8 A.R. 277, and *Baby v. Ross* (1892), 14 P.R. 440, specially referred to.

Held, also, that no distinction was to be made between the portion of the profits derived from the drug business, which the wife was not, but the husband alone was, qualified to carry on, and the profits from the rest of the business: the wife might have rendered herself liable to the penalties prescribed by the Pharmacy Act, R.S.O. 1914, ch. 164; but the proceeds of the drug business, with one exception, were not to be regarded as the property of the husband.

The Queen ex rel. Warner v. Simpson (1896), 27 O.R. 603, distinguished.

Held, as to certain company-shares purchased by the husband from wholesale druggists and goods supplied to him by these druggists and the profits upon them, that they were the husband's property; the possession of them by the wife was as trustee for her husband; and his interest was liable to satisfy the plaintiffs' judgment-debt.

Some time before the action was brought, the plaintiff W., who had recovered the judgment against the husband, assigned the judgment-debt to the plaintiff G., who made a concurrent declaration in writing that he was not the beneficial owner of the judgment-debt—that he was a trustee for W., to whom he was to account for all moneys received, after paying costs:—

Held, that, although the agreement between the plaintiffs was an illegal one, the plaintiff W. could make out his case without it, and his right of action was not affected.

Colville v. Small (1910), 22 O.L.R. 426, followed.

ACTION by one Walker, who in 1895 obtained a judgment for the payment of money against Thomas Franklin Brown, and by one Guise-Bagley, to whom the judgment, which was unsatisfied, had been assigned, as plaintiffs, against Thomas Franklin Brown and his wife Effie Florence Brown, as defendants, for a declaration that the defendant Effie Florence Brown was a trustee for her co-defendant of certain property and assets; that these were liable to satisfy the judgment-debt; and (by amendment) that part of the supposed earnings of a business purchased by the defendant Effie Florence Brown were proceeds of a separate business of the defendant Thomas Franklin Brown.

February 9. The action was tried by KELLY, J., without a jury, at Toronto.

Hamilton Cassels, K.C., for the plaintiffs.

George H. Watson, K.C., for the defendants.

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March 21. KELLY, J.:—In the early part of the year 1889, the defendant Thomas Franklin Brown was a member of a firm carrying on business at Tottenham and elsewhere as general merchants, under the name of Brown Brothers & Son, the other members of the firm being his father, Thomas Brown, and his uncle, Joseph Albert Brown. On the 6th June of that year, they made an assignment for the benefit of creditors.

The insolvent firm was indebted to the plaintiff Walker; and on the 3rd September, 1895, he obtained a judgment against them for the debt and costs, which remains unsatisfied. The present action is against Thomas Franklin Brown and his wife, Effie Florence Brown, for a declaration that the latter is a trustee for her co-defendant of certain property and assets, including moneys deposited in banks, moneys secured by mortgages of real estate, and real estate in the town of Shelburne, all standing in her name, and an automobile; and for a further declaration that these are liable to satisfy the judgment-debt.

Before the close of the trial, the plaintiffs' counsel made application to amend the statement of claim by alleging that part of the earnings of the business purchased by the defendant Effie Florence Brown from one Belfry, hereinafter referred to, were and are proceeds of a separate business carried on by the defendant Thomas Franklin Brown. I have allowed the amendment.

The defendants were married in November, 1885. The defendant Thomas Franklin Brown in 1883 qualified and became registered as a druggist; and, since that time, the membership fees required by the Pharmacy Act to keep him in good standing as a pharmaceutical chemist have been paid.

At the time of the defendants' marriage, Mrs. Brown was possessed of money in her own right, amounting to somewhat more than \$650, which she had earned by working as a milliner.

On the 29th August, 1889, she entered into a written agreement to purchase from Belfry his stock in trade, consisting of drugs, stationery, shop-fixtures, etc., in the village of Shel-

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burne, paying therefor \$250 in cash, the balance of the purchase-money being secured by a chattel mortgage from her to him. The cash payment of \$250 was made out of Mrs. Brown's personal moneys; that is conceded by the plaintiffs, as well as sufficiently established by the evidence. The subsequent payments were made out of moneys earned in the business so purchased. This business has been carried on ever since without any apparent change of ownership, and has been successful to the extent of not only supporting the defendants, but also of enabling them to accumulate a substantial amount of profits, part of which is invested in the securities or assets now sought to be reached.

The position of the defendants is, that the business and all the proceeds thereof were and have continued to be the separate property of the wife. On the 29th August, 1889, the day on which she made the contract for purchase from Belfry, Mrs. Brown executed, in favour of her husband, a power of attorney, general in form, including the signing, making, and endorsing of her name to cheques, orders for the payment of money, bills of exchange, notes, drafts, etc., and the doing of "all things necessary to the carrying on of any business he may manage for me."

Leases of premises in which the business has been carried on have been taken from time to time in the name of Mrs. Brown, the business bank account has always been in her name, the conveyance of the real estate has been to her, and the books of account are as if the business was hers. Her husband has acted in the capacity of manager of the business; and on the 15th April, 1892, a written agreement was entered into between them, declaring that the purchase by Mrs. Brown from Belfry was upon the express understanding that her co-defendant would "run" and manage the business for her, and that he had done so from the time of the purchase; and it was therein agreed that she should pay him for his services \$10 a month, and that she should, so long as he managed the business, pay the fees necessary to keep him in good standing as a registered pharmacist. The agreement also provided that the husband "shall to the best of his ability 'run' said business, and bind the first party" (his wife) "in all matters pertaining thereto as if the first party was a registered pharmacist and acting herself in the premises, it being expressly understood that he shall keep proper books of account shewing all transactions of

said business and that will clearly and properly disclose its position at all times." There is a further provision that, in the event of Mrs. Brown's death, her husband shall carry on, for the benefit of the party or parties named in her will, the business until wound up as directed by the will, and that all contracts made subsequent to her decease in prosecution thereof by the husband shall bind her estate.

The business has always gone on in the manner contemplated by this agreement and the above mentioned power of attorney. The books of account are in form consistent with this; and, as they shew and also both defendants testify, the husband in all these years has been paid regularly \$10 per month for his services as his wife's employee. The sale of drugs has always been and continues to be a part of the business; the husband has been the only one qualified to do dispensing and deal in certain commodities which only a pharmacist may deal in. A label which is usually attached to the drugs sold in this business is in this form:—

T. F. BROWN

Chemist and Druggist

SHELBURNE

ONTARIO.

Purchases of drugs or drug supplies were made from various companies, with one of which, the United Drug Company Limited, a written agreement of the 23rd February, 1910, was entered into by the defendant Thomas Franklin Brown and his son J. F. Brown (who is also a qualified pharmacist), by which these two men were given the exclusive right to handle certain drug-merchandise in Shelburne; and about the same time they subscribed for one share of capital stock, of the par value of \$100, in this company. The secretary-treasurer of the company was called for the plaintiffs and testified that to entitle a person to purchase the company's goods he must be a shareholder.

In 1915, the defendant Thomas Franklin Brown and his son became the holders of two shares, of the par value of \$50 each, of the capital stock of the Drug Trading Company Limited. The evidence of the managing director of that company is that the defendant T. F. Brown has been purchasing his company's goods and receiving dividends on sales of the company's goods which only a shareholder may receive.

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I refer specially to these transactions because the plaintiffs attach great importance to them as supporting their contention that the business is that of the husband and not of the wife; that, notwithstanding the express terms of the husband's employment, and the fact that the business was purchased out of the wife's moneys, and has been carried on during all these years in her name, the husband has a proprietary interest in it, and particularly in that part which comprises drugs, prescriptions, etc.; that, as the wife was not qualified to carry on a drug business, it could not have been that the husband included in the services agreed to be performed for her, such as depended upon his qualification as a druggist.

Where a husband is associated with a business said to be his wife's, the question whether he is her agent, or whether the business belongs to him, is one of fact; and the test appears to be, whether the wife is trading independently of her husband without being accountable to him for the profits of the business. The mere fact that a married woman engages the services of her husband in the management of, or as an employee in, her separate business, does not of itself entitle him to a proprietary interest in it or in its proceeds; nor are the profits which arise from his labour or skill, by the simple fact of such engagement or employment, deprived of the character of separate estate of the wife, or rendered subject to the claims of his creditors.

In any given case into which other elements enter they must be given consideration.

In *Campbell v. Cole* (1884), 7 O.R. 127, a decision of a Divisional Court, the judgment rested mainly on three grounds which were held to distinguish that case from *Murray v. McCallum* (1883), 8 A.R. 277, to which reference will be made later on. These grounds were: first, that the husband was not in receipt of wages, and so in a subordinate position; second, that he interfered in the management of the business ostensibly as owner; and, third, that he actually interfered in the particular transaction which led to the incurring of the debt which was sought to be recovered. There was no written agreement defining the business relationship between the husband and wife, and it fell to the Court to determine, on the circumstances under which the business was carried on, whether the husband was the agent for the wife or in reality the owner of the business. The Court determined in favour of owner-

ship by the husband. The facts, it will be observed, were distinguishable from those of the present case.

In *Harrison v. Douglass* (1877), 40 U.C.R. 410, referred to in the judgment in *Campbell v. Cole*, this strong language is used as against ownership in the wife (p. 415): "If the occupation or trade be such that the wife cannot carry it on without the husband's active co-operation or agency, it is not easy to discover in what sense it can honestly be called an occupation or trade carried on by her 'separately from her husband.' " There, again, the Court was dealing with circumstances and facts quite different from those now before me.

Laporte v. Costick (1874), 31 L.T.R. 434, also referred to, is not a parallel case, and was decided on different facts, the effect of the finding there being that the wife was not acting independently of the husband; that she was his servant or employee, and not he hers.

In *Meakin v. Samson* (1878), 28 U.C.C.P. 355, where the judgment of the Court *en banc* was against the wife, who claimed to have been trading separately, the husband, who had been engaged in business, had become insolvent and had failed to obtain his discharge. Certain persons who had been his creditors, and knew his inability to carry on business on his own behalf, furnished the plaintiff, who had no separate estate, with goods, taking her notes in payment. The business name used was that of the wife, but the business was carried on entirely by the husband, acting under a power of attorney from her which enabled him to enter into all contracts and give notes etc. in her name, and at an alleged salary of \$10 a week. The wife and children all lived together away from the place of business, which the wife seldom visited and never for business purposes. This happened at a time when a married woman could not be held liable on a promise to pay unless she had separate estate, and it was the view of the Court that she was not possessed of separate estate, unless the goods furnished to her could be so considered. A majority of the Court held that the wife was not entitled to the goods; that there was no separate trading by her within the meaning of the statutes; and that the whole thing was a device to enable the husband to carry on business in the plaintiff's name, and so defeat his creditors. In his reasons for judgment, Hagarty, C.J., at p. 364, says: "I agree with my bro-

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ther Gwynne that if any of the merchants who appeared in this case had chosen to present or give to this claimant a quantity of goods to start her in some really separate business, or to supply her wants, or to aid in the support of her and her family, they had a right so to do, and such goods would be her separate property. But nothing of that kind is presented here. No personal communication took place between the wife and the parties furnishing the goods; and the dealing is carried on in the guise of a sale of goods as to a dealer on the ordinary terms of credit, and notes given therefor in the name of a firm, which her husband alleges to have consisted of herself, and signed by her husband for her. I am of opinion that this is not one of the ways in which the Legislature has permitted a married woman to acquire property apart from her husband's rights or control. The goods are certainly not given, they are professedly sold for business purposes."

These statements are of service in determining what constitutes separate estate. The plaintiff was there risking nothing in embarking in business. Had her separate estate been involved, it would not have been unreasonable for her to have endeavoured to protect it against the claims of her husband's creditors; but she had no such separate property needing that protection. In that respect at least, there is a substantial distinction between that case and the one now under consideration.

In re Gearing (1879), 4 A.R. 173, has also been cited. In some respects it bears resemblance to the present case; but important points of distinction are: that it there appeared to have been understood by every one engaged in the transaction that the object of the purchase of the insolvent husband's estate in the name of the wife, for which she gave her promissory notes secured by a mortgage on her separate real estate, was to enable the husband to continue the business, and the judgment rested entirely upon the conclusion that, granting the stock in trade to have been the wife's separate property, she never employed it in trade separate from her husband, and was never herself a separate trader.

In *Murray v. McCallum*, 8 A.R. 277, above referred to, the Court being equally divided, the judgment appealed from, upholding the separate trade or business by the wife, was affirmed. Cameron, J., who concurred with the Chief Justice in dismissing the appeal, put the matter thus, at p. 306: "If the husband lives

in the house with the wife where she carries on business, she does not in one sense carry on an occupation or trade separate from him. But if he has no interest in the occupation or trade it is separate from him in a legal sense." And at p. 307: "In my opinion the employment by her of her husband in any occupation or trade she may carry on will not make her property or the proceeds of such occupation or trade her husband's or liable for his debts. And unless it appears by the evidence in the case that the husband has a legal interest in or right or interference with the business without her consent, as matter of law, such property or the proceeds of such occupation or trade cannot be held to be the husband's or be made liable for his debts. It must thus be a question of fact in every case. Is the occupation or trade of the wife carried on by her separately from her husband?"

It will be observed that in many cases, where the finding has been against the business being the separate property of the wife, there has been nothing in writing defining the relationship of the husband and the wife towards each other in the conduct of the business, and inferences have had to be drawn solely from their conduct and acts.

This brings us to another phase of the matter much relied upon by the plaintiffs—the husband's activity in the conduct of the business, for his services in which during all these years his sole remuneration has been \$10 per month and the payment of the annual fee to keep him in good standing as a registered pharmacist. This is pointed to as indicating either that the business is his own or that he has a proprietary interest therein. That, however, is not conclusive as against a separate trading by the wife. There is no law that I know of which compels a man in the position of the defendant Thomas F. Brown to give his services for any stated remuneration or to work for his creditors; even though a young, active man, such as was this defendant at the time of the purchase of the business in 1889, should be willing to place himself in the menial position of spending the best years of his life in his wife's employ at a rate of remuneration which he has been receiving for more than a quarter of a century. It may be, too, that the remuneration he has received is commensurate with the value of his services; there is no evidence before me to determine that value.

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In *Baby v. Ross* (1892) 14 P.R. 440, where the judgment-debtor's wife had mortgaged her farm for the purpose of paying some of his debts, and, after the mortgage, instead of continuing to work the farm for his own benefit or on shares with his wife, as he had formerly done, he agreed that until the mortgage was paid off he would work it for his wife alone, it was held that this was not illegal or unreasonable, and on no principle could it be said that this was a making away with property in order to defeat or defraud creditors.

That a man is not legally compellable to labour for his creditors was held in *Rush v. Vought* (1867), 55 Penn. St. 437; and there is authority for the proposition that the absence of a definite agreement as to his compensation (for employment by his wife) does not alter the rule. Nor, in my opinion, is the situation altered by the fact that the services agreed to be performed include those involving special or exceptional skill or knowledge on the part of the employee. If such a one choose to market for a price the product of his special qualification, the fact that he is indebted to others should not be an objection to his doing so.

In a New Jersey case, *Arnold v. Talcott* (1897), 55 N.J. Eq. 519, the right of a wife to engage for pay the services of her husband was upheld, the decision being that if a married woman in good faith employ her husband to devise and perfect mechanical inventions for her, she agreeing to pay all the expenses to be incurred and also to pay him a salary out of her separate estate, and in pursuance thereof the patents for the inventions are issued or assigned to her, the patents and their proceeds are her separate property and cannot be reached by the husband's creditors.

In *Guttman v. Scannell* (1857), 7 Cal. 455, the judgment was, that a fraud upon the husband's creditors will not be conclusively presumed although the trade carried on by the wife is unsuited to her sex.

But, again, it is said that the arrangement entered into at the time Mrs. Brown purchased the Shelburne business in 1889, and evidenced by the writing entered into three years later, was simply a scheme or device to put any assets of the husband beyond the reach of his creditors, and so defeat their just claims. Transactions of this kind are to be scrutinised closely, and I do not desire to be taken as disagreeing with any of the authorities cited by the plaintiffs, which, I think, are not cases parallel to the present one.

The situation, as it appears to me, is not that there was a design to place the husband's property out of the reach of his creditors, but to preserve and keep the wife's property out of their reach. There was sufficient to suggest to her that course. Her husband was a member of a partnership whose business ventures had failed; in the failure moneys of hers derived from her personal earnings before her marriage, and lent to the partnership after her marriage, were lost. Having had some personal experience in business, she may have had confidence in her own ability to embark successfully in business, and she may not have been willing to trust her moneys to her husband, whose past experiences were not attended with success and whose confidence in himself and whose ambitions do not seem to have taken him, even in the prime of life, above an earning of \$10 per month. It is not shewn that the success which has attended the business which she entered into in 1889 has been due to any special ability on her husband's part.

One other objection under this heading remains to be considered, namely, that the husband has a proprietary interest in that part of the business—the drug business—which she has been enabled to carry on only through him as a qualified pharmacist; that, not being so qualified, her engagement of her husband as her manager or employee did not extend to acts of his which only a person so qualified could perform, and that to that extent the proceeds of the business belong to him and not to her.

The Pharmacy Act, R.S.O. 1914, ch. 164, sec. 22, declares that no person other than a person registered under sec. 17 shall be entitled to be called a pharmaceutical chemist; and no person except a pharmaceutical chemist, or his registered apprentice, shall compound prescriptions of medical practitioners; and sec. 28 (a), that no person shall "sell or keep open shop for retailing, dispensing or compounding poisons, drugs or medicines" except certain articles therein mentioned, or (b) "assume or use the title of 'Chemist and Druggist' . . . or any sign, title or advertisement, implying or calculated to lead the public to infer that he is registered under this Act . . . and has a certificate under section 20." It is urged that the effect of these enactments is to place the wife under such prohibition as to render the returns from sales of articles or commodities which she is so prohibited from selling, the property of the husband and not hers. For contra-

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vening any of these prohibitory provisions, the Act imposes a penalty. It is manifest that what is aimed at is the protection of the public against the danger incident to the handling or selling of dangerous drugs or drug commodities by unqualified persons.

In *The Queen ex rel. Warner v. Simpson* (1896), 27 O.R. 603, cited for the plaintiffs, it was held that a person so unqualified could not escape the penalties provided by the Act by the mere fact that he employed a qualified person to conduct his drug business, under whose supervision that part of the business was carried on. The question involved was, whether the defendant did keep an open shop "for retailing, dispensing, and compounding poisons, contrary to the form of the Pharmacy Act," the information having been laid under sec. 24 of the Act then in force (R.S.O. 1887, ch. 151). That section is in identical words with the corresponding section now in force. The decision was, that the defendant did keep open shop within the meaning of the Act, and thereby became liable for the penalties prescribed by the Act, but it did not go so far as to declare the defendant disentitled to the benefit of the proceeds of the business, or that such proceeds belonged to the qualified pharmacist employed by him. Indeed, the contrary seems to have been the view, for in his reasons for judgment Meredith, C.J., said: "The profits of the business were his" (the defendant's) "less what he paid Lusk, who was a servant"—Lusk being the qualified pharmacist employed by the defendant.

It may be that Mrs. Brown, in carrying on the business as she conducted it, employing a qualified pharmacist to perform for her acts and services which she is prohibited by the Pharmacy Act from performing, has rendered herself liable to the penalties prescribed by the Act. That, however, is not for determination here. I cannot see that the proceeds of the drug department of her business, except in the excepted instances to which I shall presently refer, are, under the circumstances, the property of the husband.

I am, however, of opinion that the commodities purchased by the husband from manufacturers and dealers in the manner and under the circumstances in which purchases were made from the United Drug Company Limited and the Drug Trading Company of Toronto, above referred to, and the proceeds of the sales of these commodities, did not and do not constitute a part of Mrs. Brown's

business, but belong to her husband. These transactions were entered into personally by him and in his own name (in one case his son being a co-purchaser with him); personally he subscribed for the shares of the capital stock of these companies, the purchase of which was limited to qualified pharmacists; and the dividends thereon have been paid to the purchasers. His wife was not a party to these transactions, and there is no sufficient evidence that the purchases were made for her or under authority from her. Ostensibly, and, as I believe, as a fact, these transactions were on his own account. The whole surrounding circumstances bear that out. His statement at the trial that he made a mistake in entering into one of these contracts in his own name does not impress me. I am unable to come to any other conclusion but that any moneys arising from these purchases belong not to the wife's business, but are the property of the husband.

In respect of the interest he has so acquired, and also in respect of any other purchases he may have made under similar circumstances and in like form—and both as to the capital stock he acquired in the selling companies and the goods purchased from these companies under these or similar contracts in which a purchase of capital stock is involved—the interest he acquired and the proceeds thereof became his, and not his wife's or a part of her separate estate; and, so far as that interest enters into the business carried on by the wife or into the assets purchased from the earnings of the business, she is a trustee for her husband, and such interest is liable to satisfy the judgment-debt referred to.

The defendant Effie Florence Brown sets up the further defence that the transfer by the plaintiff Walker to his co-plaintiff of an interest in the judgment referred to was for a wrongful and illegal purpose, and that it and the prosecution of this action in pursuance thereof are illegal.

The facts are that on the 17th January, 1913, the plaintiff Walker made a written assignment to his co-plaintiff of the judgment-debt and his rights thereunder, and covenanted to do all necessary acts and things to enable him at his own cost to recover, with the right to use the assignor's name in any proceedings for recovery. Concurrently with the assignment, the assignee made a written declaration that, though the assignment was absolute in form, the real intention was, not to make the assignee the bene-

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ficial owner, but to secure him against the costs of enforcing the judgment, and, after satisfying the costs, that he should account to the assignor for all moneys received; and the assignee declared himself a trustee for his co-plaintiff accordingly.

This, the defendant Mrs. Brown asserts, disentitled the plaintiffs to recover. Had the action been brought by the plaintiff Guise-Bagley, the assignee, alone, the objection would have been well taken, following what was laid down by a Divisional Court in *Colville v. Small* (1910), 22 O.L.R. 426. But the same judgment, instead of denying the right to the original holder of the claim (here the judgment) to assert his claim notwithstanding the assignment, rather affirms that right. The present case could not be put in more apt language than the following, in which my brother Riddell (at pp. 427 and 428) expressed his reasons for his conclusions: "The general principle is, that all champertous agreements are void—the older cases say *malum in se*. If then a party to a champertous agreement must rely upon the illegal agreement to sustain an action, he fails; but, if he, although a party to such an agreement, can make out his case without calling in the agreement, the existence of the invalid agreement does not void the right of action he has without it. For example, if a plaintiff have agreed with his solicitor or a third person to give him a portion of the profits arising from the successful prosecution of a suit, upon being indemnified against the costs, he will not be barred in his action—he is in the same position *quoad* the defendant as though he threw away the agreement altogether—the agreement does not enter into the action. The fact of the agreement being void does not affect the actual right of action he has. But, if the solicitor or third person, assignee, should bring an action, as he has no right of action at all unless the agreement has effect, and it has none in law, he will fail."

That fully covers the present case in favour of the plaintiff Walker's right, and against the plaintiff Guise-Bagley's right, to maintain the action.

Judgment will be in favour of the plaintiff Walker in accordance with the above findings; and there will be a reference to the Master in Ordinary to ascertain the value of the defendant Thomas Franklin Brown's proprietary interest in the business derived from the purchase of drugs and commodities from the said two com-

panies, and from his subscription to the capital stock of these two companies, and to ascertain if other similar purchases were made on similar terms and conditions, and the value of Thomas Franklin Brown's further interest in the business as the result of such further similar purchases.

Further directions and costs of the action are reserved until after the Master's report.

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[APPELLATE DIVISION.]

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Limitation of Actions—Tenants in Common—Possession by one Tenant—Bailiff or Guardian of Co-tenants—Break in Possession—Limitations Act, R.S.O. 1914, ch. 75, sec. 5—Equitable Rights—Conduct Precluding Assertion of.

The judgment of MEREDITH, C.J.C.P., 34 O.L.R. 63, was affirmed.

Per MEREDITH, C.J.O., delivering the judgment of a Divisional Court:—

The possession of the defendant after her husband's death was, as respects the interests of the five children, that of bailiff for the children; but there was, on the facts of the case, a sufficient break in the possession to dissolve the relationship of principal and agent or bailiff, or ward and guardian, that existed between the plaintiffs and the defendant, more than ten years before the proceedings for partition were begun; and the defendant had acquired a title to the land under the Limitations Act, R.S.O. 1914, ch. 75, sec. 5.

In re Maguire and M'Clelland's Contract, [1907] 1 I.R. 393, approved and followed.

The right of the plaintiffs to treat the defendant in respect to her possession as bailiff for them rested upon equitable principles; and, in the circumstances of the case, they were precluded by their acts and conduct from invoking the equitable doctrine upon which they relied.

Snider v. Carleton (1915), 35 O.L.R. 246, and [1916] A.C. 266, *sub nom. Central Trust and Safe Deposit Co. v. Snider*, applied and followed.

APPEAL by the plaintiffs from the judgment of MEREDITH, C.J.C.P., 34 O.L.R. 63.

February 21. The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, JJ.A.

J. H. Spence, for the appellants.

G. H. Kilmer, K.C., for the defendant, respondent.

Reference was made to the following authorities: *In re Maguire and M'Clelland's Contract*, [1907] 1 I.R. 393; *McMahon v. Hastings*, [1913] 1 I.R. 395; *Quinton v. Frith* (1868), 1 I.R. 2 Eq. 396; *Wall v. Stanwick* (1887), 34 Ch.D. 763, 766; *Kent v. Kent*

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(1890-2), 20 O.R. 158, 445, 19 A.R. 352; *Heward v. O'Donohoe* (1890), 18 A.R. 529; *Lyell v. Kennedy* (1889), 14 App. Cas. 437; Simpson on Infants, 3rd ed., p. 99; *Thomas v. Thomas* (1855), 2 K. & J. 79; Halsbury's Laws of England, vol. 19, p. 135.

March 21. The judgment of the Court was delivered by MEREDITH, C.J.O.:—This is an appeal by the plaintiffs from the judgment dated the 19th November, 1915, which was directed to be entered by the Chief Justice of the Common Pleas, after the trial before him, sitting without a jury, at Walkerton, on the 9th day of that month, of an issue which was directed by an order dated the 4th day of May, 1915.

The issue was directed in a proceeding taken by the appellants for the partition or sale of a lot in the town of Southampton, which at the time of his death belonged to their father George H. McNab; and the claim of the appellants is that each of them is entitled as one of his heirs at law to an undivided interest in the lot.

The question which was directed to be tried was, "whether" the respondent "has acquired a title to the lands . . . under and by virtue of the statute known as the Limitations Act."*

That the appellants are the owners of the undivided interests which they claim, unless by the operation of the Statute of Limitations their title has been extinguished, as the respondent asserts that it has been by her possession of the lot, is not disputed.

McNab died intestate on the 30th day of June, 1892, leaving the respondent, his widow, and four children by a former wife and one by the respondent, his heirs at law surviving him. Duncan John, the eldest of the children, was born on the 19th October, 1876, Victoria Elizabeth on the 23rd September, 1878, Bolena Ann, or Dollena, as she is called in these proceedings, on the 5th December, 1880, Mary Irene on the 15th December, 1883, and Barbara Jane on the 15th April, 1891.

Bolena Ann and Mary Irene are the appellants.

When McNab died, he was living with his wife and his five children in a log-house on the lot in question, and there was another house on the lot, partly finished, and the lot was mortgaged.

The respondent subsequently paid off the mortgage, completed the unfinished house, and made improvements to the other house.

*See R.S.O. 1914, ch. 75, sec. 5.

No one obtained letters of administration of the estate of McNab, but the respondent took upon herself the administration of it, sold the household furniture, and paid her husband's debts.

At the time of McNab's death, the unfinished house was rented. The respondent continued to live with her children, except Bolena Ann, in the log-house until April, 1893, when she moved with them to Kincardine and lived there with her mother until the following June. She then removed to Dubuque, Iowa, taking the children with her, and she and they, except Bolena Ann, lived there, with her mother-in-law, brother-in law, and sister-in-law, until March, 1895. The two eldest children were "out earning their living," and Bolena Ann lived with her grandmother. In March, 1895, the respondent returned to Kincardine to her mother's house and remained there until 1896, when she went to keep house for a Mr. Sang. She then married her present husband, Speare, and the two lived together in Hamilton, the husband going there in September, 1896, and the respondent in the following April. In 1899, they came to Southampton and occupied the log-house, in which they lived until the spring before the trial. While the respondent was away from Southampton, the two houses were rented at times, but were idle for sometimes a month, sometimes two months, and sometimes three months, and the rents were collected by the respondent.

From 1900 the lot has been assessed either in the name of the respondent or her husband, as owner, and one or other of them has paid the taxes.

When the respondent left Dubuque, she left there furniture worth more than the furniture of her husband which she had sold, and while in Dubuque she paid out of her earnings debts of her husband McNab to the amount of nearly \$200. She also expended in making improvements on the property between \$700 and \$800. The mortgage was partly paid by \$200 of insurance money, which belonged to the respondent, and she "scraped to get the rest," and her present husband gave her \$66 "to finally clear it off."

That the possession of the respondent after her husband's death was, as respects the interests of the five children, that of bailiff for the children, cannot be and is not disputed; but it is argued for the respondent, and was held by the Chief Justice,

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that, in the circumstances of the case, that relationship was put an end to more than ten years before the proceedings for partition were begun.

The view of the Chief Justice was, that this relationship came to an end in 1897, when the respondent returned to Canada from Dubuque, leaving there all the children except her own daughter Barbara Jane, or at the latest in 1899, when, after her marriage with her present husband, he and she went to reside on the lot.

The question to be determined is one of fact; and, in my opinion, the fact that the respondent and her husband have for nearly twenty years been in occupation of part and in receipt of the rents and profits of the remainder of the land, and during all that time until quite recently no claim to or assertion of any right in the land or to an account of the rents and profits of it has been made by the children, is an important fact leading to the conclusion that the relationship of bailiff had come to an end and that that was recognised by the children.

That view is strengthened when there is added to the fact I have mentioned the further facts that, during all that time, the respondent has treated and dealt with the land as her own, has had it assessed in the name of herself or of her husband as owner, has paid the taxes, has made the improvements on the property at a cost of \$700 or \$800—very nearly three-quarters of the present value of the property—and has, mainly by using her \$200 of life insurance money and from the proceeds of her own labour, and partly with money obtained from her present husband, paid off a mortgage on the property which existed when McNab died, as well as paid the interest on it for many years; and that at no time has she kept any account of her receipts and expenditures, believing, as she did, that what she was receiving was her own and what she was expending was being expended for her own benefit.

The facts of the case in *In re Maguire and M'Clelland's Contract*, [1907] 1 I. R. 393, referred to by the Chief Justice, bear a close resemblance to the facts of the case at bar, though there is the difference between them that in the Irish case the children left the parental roof, one of them to go into a convent and the others to go to the United States of America; while, in the case at bar, the children were taken by the mother to Dubuque and left there when she returned to Canada in March, 1895. The

appellants had not then attained their majority, but one of them arrived at the age of twenty-one on the 5th December, 1901, and the other on the 14th December, 1904. It is not stated in the report of the Irish case whether, when the children left the parental roof, they or any of them had attained their majority.

I was much struck with the observations of the Chancellor (Sir Samuel Walker) that "according, however, to the argument of Mr. Horner" (i.e., the counsel for the purchaser who was objecting to the title), "a title never could be made, even after the lapse of fifty years or more, under the Statute of Limitations, because the children were minors at the date of the father's death. There is no case that so decides; the cases shew that the relationship of principal and agent will be dissolved by circumstances; the attaining of twenty-one years of age by the children is not enough in itself to dissolve the relationship, provided there is no break; but here the children left the place a long time ago; no claim has ever been put forward by any of them; and I am of opinion that those facts constitute a sufficient break in the possession to dissolve the relationship of principal and agent or guardian and ward" (p. 400).

Accepting, as I do, this as a correct statement of the law, I am of opinion that there was, on the facts of this case, a sufficient break in the possession to dissolve the relationship of principal and agent, bailiff, or guardian and ward, that existed between the respondent and the appellants, and that the judgment of the Chief Justice should be affirmed and the appeal be dismissed with costs.

The judgment may be supported on another ground. The right of the appellants to treat the respondent in respect to her possession as bailiff for them rests upon equitable principles; and, in the circumstances of the case which I have mentioned, they are, I think, precluded by their acts and conduct from invoking the equitable doctrine upon which they rely. They all along, at all events after having arrived at years of discretion, knew that the respondent was treating and dealing with the property as her own, that she was at her own expense improving it, and that she was paying off the incumbrances upon it with her own money, and they made no objection to her doing all this, although they must have known that she was doing it under the

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belief that she was the owner of the property and doing it not for the benefit of the children but of herself.

The principle which was applied by the Judicial Committee of the Privy Council in *Snider v. Carleton* (1915), 35 O.L.R. 246, and [1916] A.C. 266, *sub nom. Central Trust and Safe Deposit Co. v. Snider*, is, in my, opinion, applicable, and the appellants cannot be heard in a Court of Equity to say that the respondent's possession was, in the eye of that Court, their possession.

In parting with the case, I cannot refrain from expressing my regret that a very expensive litigation has been entered upon about a piece of property which, with the improvements the respondent has made, is not worth more than \$1,200, and the interest of the appellants in which is not worth, after deducting the respondent's share, more than \$360, to say nothing of the long and expensive inquiry that, if the appellants had succeeded, would have been necessary to ascertain the state of the account between them and the respondent after allowing to her the value of the improvements she has made and the money she expended in paying off the mortgage, the result of which probably would have been to give to the appellants but a barren victory over their stepmother, owing to whose struggles and exertions, and to them alone, is due the fact that any part of her first husband's property remains to be fought over.

Appeal dismissed with costs.

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[APPELLATE DIVISION.]

March 21.

WHITE v. GREER.

Contract—Purchase and Sale of Timber—Oral Agreement—Subject-matter—Whole of Season's Cut—Property Passing—Acceptance of Timber—Appropriation to Contract—Time for Delivery—Finding of Trial Judge—Appeal.

In an action for the price of timber cut and taken out by the plaintiff during the season of 1913-1914, under an agreement, not in writing, for the purchase thereof by the defendant, the plaintiff alleged that what he sold and what the defendant bought was the whole of his cut; while the defendant asserted that he agreed to buy only so much of the cut as was passed down stream into a certain lake in the season of 1914:—

Held (MAGEE and HODGINS, J.J.A., dissenting), that, on the evidence, the defendant intended to buy and did buy the whole of the cut; and that the effect of what took place—the inspection, measuring, and branding of the

cut—was to pass the property in the whole to the defendant as finally appropriated and accepted under the contract.

Wilson v. Shaver (1901), 3 O.L.R. 110, and *Craig v. Beardmore* (1904), 7 O.L.R. 674, followed.

Both parties assumed that delivery would be completed in the season of 1914, but there was no definite bargain with regard to the time of delivery; the law implied a duty to perform within a reasonable time; the final delivery made by the plaintiff in 1915 was, in the circumstances, made within a reasonable time; and the plaintiff was entitled to the price of the whole cut.

Judgment of CLUTE, J., reversed.

Per HODGINS, J.A.:—The bargain was, as found by the trial Judge, to deliver during the season of 1914. The property in the timber passed to the defendant, notwithstanding that the plaintiff had still to make delivery. While the contract was entire, delivery of all was not necessarily to be made at one time; delivery in part was expected and accepted as proper performance of the plaintiff's obligation; and so the contract was treated as if it were separable, and each delivery was dealt with by itself. The defendant accepted what was delivered in time; and it could not be said that he knew as a fact that the remainder of the cut could not have been driven that season. The fact that the property has passed makes no substantial difference in regard to the right of rejection on late delivery or liability for the whole purchase-money. The passing of the property is not sufficient to entitle the seller to recover the whole contract price without delivery, if delivery is part of the consideration. The defendant was entitled to keep and was bound to pay for the timber delivered into the lake during the season of 1914, at the contract prices. It was competent for him, upon subsequent default, to reject the residue; and his refusal to accept must be taken as an election not to assert title to the timber. The defendant, not having possession, was not entitled to a lien for the amount overpaid by him; but the plaintiff was bound to repay it, because the overpayment was by way of advance, and not under a term of the contract vesting the right to it in the plaintiff on part delivery or at any stage of the transit.

Tarling v. O'Riordan (1878), 2 L.R. Ir. 82, *Gilmour v. Supple* (1858), 11 Moore P.C. 551, 566, and *Calcutta and Burmah Steam Navigation Co. v. De Mattos* (1863-4), 32 L.J.Q.B. 322, 33 L.J.Q.B. 214, specially referred to.

APPEAL by the plaintiff from the judgment of CLUTE, J., at the trial, dismissing the action and awarding the defendant \$2,200 upon his counterclaim.

The action was brought to recover a balance of \$2,358.44 alleged to be due to the plaintiff for saw-logs and timber cut and taken out by the plaintiff during the season of 1913-1914, under an agreement not reduced to writing.

The counterclaim was for damages for non-delivery and for money overpaid.

January 12 and 13. The appeal was heard by MEREDITH, C.J.O., GARROW, MACLAREN, MAGEE, and HODGINS, JJ.A.

J. M. Ferguson and *J. T. Mulcahy*, for the appellant, argued that it was clearly shewn by the evidence that the intention of the parties was that the defendant should purchase the whole

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of the plaintiff's cut of timber for the season of 1913-1914, and that the effect of the whole transaction was to pass the property in the whole of the timber to the defendant. The case that comes nearest to the case at bar is *Craig v. Beardmore* (1904), 7 O.L.R. 674. Reference was also made to *Wilson v. Shaver* (1901), 1 O.L.R. 107, 3 O.L.R. 110; *Calcutta and Burmah Steam Navigation Co. v. De Mattos* (1863), 32 L.J.Q.B. 322. There is no allegation of negligence. Hemlock went down, and the defendant wanted to get out of his bargain.

T. Johnson, for the defendant, respondent, argued that the judgment of the learned trial Judge was right, and should be affirmed. The contract was to be fulfilled during the season of 1914, by delivery of the logs in Sucker Lake, and there was no waiver of this condition. The drive which was the subject of the contract had been abandoned by the plaintiff.

Ferguson, in reply, admitted the defendant's right to a certain set-off in case the Court should find in the plaintiff's favour.

March 21. GARROW, J.A.:—The plaintiff's cause of action, as set forth in the statement of claim, is, that the plaintiff agreed to sell and the defendant agreed to buy all the saw-logs and timber to be cut and taken out by the plaintiff during the saw-log season of 1913-1914, at the price of \$12 per thousand for certain of the logs and \$13.50 per thousand for certain other kinds of logs, and at prices of 15 cents and 30 cents and 40 cents per piece for certain small saw-logs; that the plaintiff took out and delivered to the defendant, as agreed, at Sucker Lake and other points arranged with the defendant, considerable quantities of saw-logs of the various kinds, amounting in all to the sum of \$6,892.12, upon which the defendant still owed a balance of \$2,358.44.

The contract was wholly verbal, and, as was perhaps to be expected, the defendant's version varies from that put forward by the plaintiff. The defendant in his pleading said that in or about the month of October, 1913, the plaintiff agreed to sell and the defendant agreed to buy all the saw-logs and timber cut and taken out by the plaintiff *and delivered at Sucker Lake* during the season of 1913-1914; that the plaintiff delivered to the defendant at Sucker Lake, in the season of 1914, in pursuance of his said

agreement, logs and timber (giving the details) amounting in value according to the agreement to the sum of \$2,228.84; that the plaintiff neglected and failed to deliver the balance of the logs and timber cut by him in 1913-1914, but in the spring of 1915 delivered a part of the said stock, which the defendant refused to accept; that the defendant had paid to the plaintiff on account of such logs and timber the sum of \$4,623.58, and had performed work upon such logs and timber at the plaintiff's request, amounting with such payment to the sum of \$5,226.65; and by way of counterclaim he claimed damages for non-delivery, together with a return of the money overpaid, amounting to the sum of \$2,983.17.

The plaintiff's allegation therefore was, that what he sold and what the defendant bought was the whole of his cut; while the defendant contends that he only agreed to buy so much of the cut as was passed down stream into Sucker Lake in the season of 1914; although, if that is so, his allegation that the plaintiff neglected and failed to deliver the balance of the cut seems to be inconsistent. Clute, J., accepted the defendant's version, dismissed the action and gave the defendant judgment on his counterclaim for the sum of \$2,200 and costs. The decision does not apparently turn on any nice questions of disputed testimony, or, in other words, upon credibility. The main facts are really not in dispute.

The defendant is a saw-miller, having a saw-mill on Sucker Lake, and he purchased the logs with the intention of cutting them into lumber at his mill. There is no doubt at all, in my opinion, upon the whole evidence, written and verbal, that the defendant intended to buy and did buy, as the plaintiff says, the whole cut, and not merely a part of it. At the time of the purchase it was, no doubt, the expectation and intention of all parties that the whole cut would be delivered into Sucker Lake, the place of delivery agreed upon, in the season of 1914, and probably early in the season, depending upon the sufficiency of water in the various runways leading to the lake.

When the agreement was made, the logs had almost all been prepared ready for delivery into the water when the time came; and later, when they had all been manufactured and were ready for delivery, they were inspected by the defendant, and, with

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the aid of a licensed scaler, Mr. Fairhall, scaled, and their contents ascertained, and they were also then branded with the defendant's own brand.

Afterwards, in the spring of 1914, a quantity of them was sent down into Sucker Lake. Apparently no separate tally of these was kept or attempted, either by the plaintiff or by the defendant—an unlikely oversight, it seems to me, unless they were, as I have no doubt they were, regarded by both parties simply as a part of the whole still to come, water permitting. This also seems to agree with the method followed by the defendant in making advances upon the purchase-money, which evidently entirely ignored the actual deliveries into Sucker Lake; with the result that at the end of the season the defendant had advanced a very large sum beyond the value of the logs which had been delivered—a sum that he now seeks to recover back.

Whatever else is obscure, it is, I think, apparent that the plaintiff's version that what he sold to the defendant was the whole cut, and not merely a part of it, is the correct one. And it is, I think, also established by the evidence, the leading features of which bearing upon this question I have recited, that not only did the defendant buy the whole cut, but that the effect of what took place in measuring and branding was to pass the property in the whole so inspected, measured and branded, to him as finally appropriated and accepted under the contract, within the numerous authorities upon that subject. See *Craig v. Beardmore*, 7 O.L.R. 674.

That the defendant so regarded it himself is apparent, if from nothing else, from his letter of the 22nd October, 1914, in which he offered to "release his brand" on certain conditions. Indeed, but for such a construction he would have had no security for the large advances he was making: a circumstance always of weight in considering such cases. See *per Osler, J.A.*, in *Wilson v. Shaver*, 3 O.L.R. 110, 114.

The question of the property passing does not appear to have been discussed before Clute, J., although it was much relied on in the argument before us by counsel for the plaintiff. The main discussion before Clute, J., to judge by the notes of judgment, was as to the other and more obscure and much more difficult question of the term of the agreement concerning delivery, some

of the logs not having been delivered until the following season, when they were refused by the defendant.

It does not, of course, determine that question to say that the property in the logs had passed to the defendant, nor, if the evidence upon the question of the time of delivery was clear, could it help to vary what must otherwise be the correct conclusion upon the evidence. Its value, in my opinion, is in helping to understand and to construe and apply evidence which is not clear and precise, as, in my opinion, the evidence upon this branch on both sides may very properly be characterised. If the property had not passed, the defendant had no interest in any logs which did not succeed in reaching Sucker Lake. But, on the other hand, if the logs were his under the bargain, he was interested not only in those sent down but in those which were left.

The direct evidence upon this branch is somewhat meagre. When the plaintiff was in the witness-box this occurred:—

“His Lordship: Do I understand the difference between the parties is this: that the defendant claims that these logs all were to be delivered that season down to Sucker Lake, and claims damages because they were not, and because they were not he claims he has overpaid you?

“Mr. Mulcahy: Yes, that is the situation.

“His Lordship (to witness, plaintiff): What do you say? A. I undertook to deliver the logs that season, I understood they were to be delivered (interrupted).

“Q. Then you did not deliver them? A. No, not all.”

In cross-examination the plaintiff remarked:—

“Q. I understand you admit you were to deliver these logs in Sucker Lake in the season of 1914? A. I was to drive out the logs.

“Q. To Sucker Lake? A. Yes.

“Q. In the season of 1914? A. I understood that, yes, if there was water enough.

“Q. Was anything said about water enough when you made your original bargain? A. No.

“Q. You were to drive them to Sucker Lake? A. Yes.

“His Lordship: That season? A. That was mentioned when we made the bargain, my Lord.

“Mr. Johnson: When were you to deliver these logs at Sucker

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Lake? A. There was no time mentioned when I was to have them at Sucker Lake.

"Q. You could have them there whenever you liked? A. I did not think of it that way. My idea was to get them there as soon as I could.

"Q. Were you to deliver them there in the season of 1914? A. That was not specified when Mr. Greer bought the logs.

"Q. You were examined a few days ago in this action? A. Yes.

"Q. You were asked then, 'Q. Was there anything else in the bargain, give me the prices? A. Well, I was to deliver the logs in Sucker Lake. Q. When? A. I expected to deliver them in the following spring. Q. That was the spring of 1914? A. Yes. Q. Was that the bargain, that they were to be delivered in 1914? A. That was the understanding. There was no guarantee.'"

The cross-examination was then resumed:—

"Q. Was that the understanding, that they were to be delivered in 1914? A. No, it was not specified.

"Q. Can you explain your answer? A. I fully expected to have delivered them in 1914.

"Q. You said that was the understanding? A. I don't remember saying that it was the understanding; I expected to deliver them.

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"Q. If you expected it, don't you think he expected it too? A. I have no reason to doubt that he expected it."

Evidence on the subject on behalf of the defendant was given—after the plaintiff had been examined—by the defendant and his son John Greer junior. In his examination in chief the defendant was asked:—

"Q. Tell me what the bargain was between you and the plaintiff about the delivery of these logs? A. They were to be delivered in the season of 1914.

"Q. Where? A. In Sucker Lake."

The son was asked:—

"Q. Do you know anything about this bargain between your father and Mr. White? A. I was present at the time. . . .

"Q. What was the bargain? Mr. White was to put the logs into Sucker Lake in the spring of 1914, during the sawing season of 1914."

That is, I think, practically all the testimony upon the subject of delivery. It will be noted that, while desire and intention are freely admitted by the plaintiff, he states more than once that nothing was actually said upon the subject. All parties assumed, as self-interest itself suggested, that delivery would be completed in the season of 1914. And it should be noted that, although the defendant and his son were both examined after the plaintiff had given his evidence, neither of them denied the plaintiff's statement that nothing was said about delivering in 1914. What they were asked was, "the bargain," not what was said, and what they answered was an inference only which they expect the Court to adopt.

In estimating the value of the evidence it is impossible to ignore the fact that in the meantime the war had seriously affected the building and lumber trades, thus supplying an obvious motive to the defendant for escaping or trying to escape, if possible, from an onerous contract. That he had such a desire is reasonably obvious from his rather singular letter of the 22nd October, 1914, before referred to, written, it will be observed, previous to the close of the season, which, on the evidence, only ends in the following month. He wrote as follows: "I have been unable to dispose of my present stock of lumber, and therefore I am afraid that we will not be in a position this season to handle any more than we have on hand at the present time. With regard to logs in Concession Lake, the way lumber is going at the present time I cannot see that we could take them at last year's prices. Had they been delivered according to our agreement, during this season, we would have tried to keep our word, *but are willing to release our mark* at any time, providing we can arrange settlement for money overpaid on account of logs"

Had the letter been a very little more explicit, it would have amounted to a repudiation of the contract before breach, thus relieving the plaintiff from making further delivery and giving him one more string to his bow.

There is little of value one way or the other in the only other written communication, namely, the letter, also from the defen-

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dant to the plaintiff, of the 27th November, 1914, although it does seem a little odd, if the defendant was so sure of his ground that a final breach has been committed by the non-delivery before the close of the season, that he should have troubled himself to suggest to the plaintiff that "it would be a fine thing to fit up your creek for driving," which could only have meant, to have any sense at all, driving out the remaining logs in the next season.

What then is the proper conclusion upon the evidence upon the question of delivery? Certainly not, I think, that there was a definite, fixed, and absolute bargain that delivery would be made in the season of 1914. The parties knew that the only way in which delivery could reasonably be made was by means of water, and that, if it failed, as it afterwards did, delivery would be impossible in that season. The circumstances, therefore, strongly suggest that, even if it were assumed that the agreement was to deliver in 1914, it should be assumed to have contained an implied term or proviso based upon the continued sufficiency of the water-supply. Similar implications, I have no doubt, have been made in much weaker cases.

Another view, and upon the whole the view which I prefer, is that there was upon the whole evidence no exact time for delivery actually fixed, with the result that the law would imply a duty to perform within a reasonable time as the true contract. What is a reasonable time is of course a question of fact, and upon that question I would without hesitation find that the final delivery made by the plaintiff in 1915 was, under the circumstances, made within a reasonable time.

For these reasons, I would allow the appeal, and the plaintiff should have judgment for his claim, with costs throughout, including the costs, if any, upon the counterclaim.

I understand the amount of the claim is not in dispute, or is the subject merely of calculation, and, if so, it can be settled by the Registrar and inserted in this judgment.

MACLAREN, J.A., agreed with GARROW, J.A.

MEREDITH, C.J.O.:—I have had the opportunity of reading the opinions of my brothers Garrow and Hodgins.

If the proper conclusion upon the evidence be that the appellant was bound to deliver the saw-logs in Sucker Lake during the season of 1914, I would agree with my brother Hodgins that the action fails and that the judgment of the trial Judge should be affirmed.

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I am, however, unable to come to that conclusion. Upon the whole evidence, the proper conclusion is, I think, that both parties thought that there would be nothing to prevent the appellant from delivering the logs during the season of 1914, and that that would be done. They both knew, however, that the only practicable means of bringing them down to Sucker Lake was by floating them by the water route by which the appellant subsequently was bringing them down when the difficulty caused by the lowness of the water was met with, and that it was not intended that there should be an absolute obligation to bring the logs down during the season of 1914, but only to do that if it were practicable to bring them down by the water route they were intended to take, and that if it should not be practicable to do this they were to be brought down within a reasonable time.

What occurred when the shortness of the water became evident appears to me to confirm this view. It is true that, if the obligation to deliver in the season of 1914 had been absolute, what occurred would not have amounted to a waiver of that term of the contract; but, although that is the case, what occurred may be looked at for the purpose of ascertaining what the contract really was. It was owing to the advice of the respondent that the course was taken of making sure of getting part of the logs down with the water that was then available for floating them, and leaving the remainder to be brought down at another time. This was a natural thing for the respondent to desire to have done, as the property in the logs had passed to him, and he had made large payments on account of the purchase-price. A change in the attitude of the respondent in this respect did not take place until the market price of saw-logs had fallen, owing probably to the breaking out of the war, and I have little doubt that but for that it would never have entered into the mind of the respondent that, if the appellant should be unable to make delivery of the remainder of the logs during the season of 1914, the respondent would be entitled to refuse to take them in the following season.

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Upon the whole, I agree with my brother Garrow's view as to the proper disposition to be made of the appeal.

HODGINS, J.A.:—This appeal was argued chiefly on a ground not brought to the attention of the learned trial Judge, and not considered by him, i.e., that the property in the saw-logs had passed to the respondent prior to the difficulties which arose later on in the season, and that by reason thereof the appellant was entitled to the full price.

The logs had been cut and were in the bush, and, after the bargain, were scaled and were stamped by the respondent. He admits that this was done when scaling for the purpose of being sure of the number of logs, and also to shew that they were his logs. This was a definite appropriation of the saw-logs to the contract of January, 1914, if indeed anything further was needed; the contract being for logs already cut and skidded and identified by negotiations had in 1913, as well as in January, 1914.

These facts are clearly sufficient to indicate that in this Province the property in the logs then passed to the respondent, notwithstanding that the appellant had still to make delivery: *Wilson v. Shaver*, 1 O.L.R. 107, 3 O.L.R. 110; *Craig v. Beardmore*, 7 O.L.R. 674.

The logs were hauled, some to Concession Lake and put on the ice, some to the Beaver Meadow, below the lake, and the remainder—about 500 pieces—to Sucker Lake itself, where all were ultimately to be delivered during the season of 1914.

Payments by way of advance were made from time to time, but these payments were all subject to the understanding that the logs were all to be delivered during the season, when the balance would be finally adjusted.

The respondent defines this season as lasting till the "freeze up," which he puts as prior to the 27th November, 1914. As, therefore, the property had passed and the time for delivery had not expired, the actions of the respondent throughout this period are quite consistent and easily understood.

When he and the appellant met in May, 1914, they had to decide what was best to do, having regard to the scarcity of water. Both were interested, for what the appellant was required to drive were at that time the logs of the respondent. The decision

was an amicable one, and did not change the legal position of either.

The appellant had the right and was bound to deliver at any time during the season which was not then ended, and the respondent did not interfere with this primary right or duty by giving his opinion or assent as to the best course to be taken at that juncture.

The giving of the note and the rendering of an account in October were natural and proper, as the contract was still unbroken. The first assertion that there was default was in the letter of the 22nd October, 1914, which refers to the statement as having been previously delivered, and says that, had the logs "been delivered according to our agreement during this season, we would have tried to keep our word," while it demurs at taking them later at the contract price.

The letter of the 27th November, 1914, I think, indicates an unwillingness to give up the logs entirely, the suggestion that this "would be a fine time to fit up your creek for driving" being consistent with a readiness to take the logs next spring, though with some rearrangement of price. But disputes ensued, and the respondent declined to accept future delivery. The logs remaining were actually put into Sucker Lake in the spring of 1915; and the question is, whether, in view of the passing of the property, the appellant can succeed as in a case of delayed delivery, or on the contention that he was merely a bailee charged with delivery and liable only for negligence.

The account put in (exhibit 7) shews, by comparison with the statement (exhibit 3), that all the logs in the latter under the heading "S. White Account" were delivered in 1914, as well as some of those in "G. White Account," leaving a considerable portion in Concession Lake.

The rights of the parties must be worked out by regarding their position under the agreement and what they did during its currency. The contract was an entire one for the sale and delivery of specified and ascertained goods. It is evident, however, that, while the contract was entire, delivery was not necessarily to be made all at one time, but that both in intention and in practice partial delivery was expected and accepted as proper performance of the appellant's obligation. If the contract was

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entire, and delivery was to be made at one time, the purchaser might reject a partial delivery and refuse to accept anything short of the whole order, or he might, in the events which transpired here, have repudiated the whole contract in November, but only on terms of returning what he had already got: *Oxendale v. Wetherell* (1829), 9 B. & C. 386; *Colonial Insurance Co. of New Zealand v. Adelaide Marine Insurance Co.* (1886), 12 App. Cas. 128. But, if partial delivery is in accordance with the contract or is accepted, although not provided for, the contract is treated as if it were separable, and each delivery is dealt with by itself: *Bragg v. Cole* (1821), 6 Moore (C.P.) 114; *Tarling v. O'Riordan* (1878), 2 L.R. Ir. 82; *Jackson v. Rotax Motor and Cycle Co.*, [1910] 2 K.B. 937 (C.A.)

In the latter case (p. 950), a statement of Morris, C.J., in *Tarling v. O'Riordan* is accepted as correctly enunciating the law where the parties intend separate deliveries, and not one delivery, and where the second delivery is not in accordance with the contract: "The defendant here accepted the first bale, and used it finding it was correct. At the time he so accepted it he could not contemplate that the remaining goods would not be sent also correctly. In my opinion the defendant was only bound to pay for the bale that was correct and accepted by him in part performance of his contract, and was not bound to pay for any portion of the second bale which he was not bound to accept."

The last sentence, having regard to the point involved in that case, would be clearer if the last few words read "which bale he was not bound to accept." Applying that statement to the facts of this case, the respondent accepted what was delivered in time, and it cannot be asserted that he knew as a fact that the remainder could not have been driven that season during the autumn freshets. Both parties were entitled to wait and see, and did so.

Does the fact that the property had passed make any substantial difference in so far as the right of rejection on late delivery or liability for the whole purchase-money is concerned? In the case of *Gilmour v. Supple* (1858), 11 Moore P.C. 551, 566, Sir Cresswell Cresswell laid down the general rule in these terms: 'By the law of England, by a contract for the sale of specific ascertained goods, the property immediately vests in the buyer, and a right to the price in the seller, unless it can be shewn that

such was not the intention of the parties. Various circumstances have been treated by our Courts as sufficiently indicating such contrary intention." The qualification as to "contrary intention" applies equally to the vesting of the property and to the vesting of the right to the price.

In *Calcutta and Burmah Steam Navigation Co. v. De Mattos*, 11 W.R. 1024, 32 L.J.Q.B. 322, 33 L.J. Q.B. 214 (1864), the Court of Queen's Bench (Cockburn, C.J., Blackburn and Mellor, JJ., *dissentiente* Wightman, J.), held that, on the proper construction of the contract, the property in a cargo of 1,166 tons of coal had passed to the purchaser (the company). One-half the purchase money had been paid to De Mattos, the seller, on the delivery on board the ship, and the balance was to be paid "on right delivery at Rangoon." The ship was damaged en route, but the cargo, to the extent of 850 tons, was transferred and ultimately reached Rangoon, but not in such a way as to constitute "right delivery" under the contract. It was in fact sold at auction at Rangoon by the carrier and bought by the company. De Mattos sued for the balance of the purchase-price, but the Court unanimously decided that he could not recover. On the question as to whether he was bound to repay what he had received and to pay damages for non-delivery, the Court was divided, two of the learned Judges being of opinion that his liability to repay was saved by the provision that one-half of the purchase-money was by the contract to be paid on delivery on board, and consequently the right to that half vested in De Mattos on shipment. In the Exchequer Chamber, Erle, C.J., Channell, B., Willes and Williams, JJ. (Martin and Pigott, BB., *dissenting*), affirmed the conclusion that the property has passed on shipment, but all the members of the Court were of opinion that De Mattos could not recover the balance of the purchase-price. Willes and Williams, JJ., thought that the company could recover damages for non-delivery.

This case shews not only that the passing of the property is not sufficient to entitle the seller to recover the whole contract price without delivery, if delivery is part of the consideration (see *Forbes v. Smith* (1863), 11 W.R. 574), but that the risk during the transit attaches to the seller, who is bound to deliver, to the extent of so much of the price as is contingently payable. It has been followed in *Dupont v. British South Africa Co.* (1901),

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18 Times L.R. 24, a decision of Kennedy, J., a Judge of experience in commercial cases. He quotes with approval the statement of Blackburn, J., in the *De Mattos* case, 32 L.J. Q.B. at p. 328, that the parties "may bargain that the property shall vest in the purchaser, as owner, as soon as the goods are shipped, that they shall then be both sold and delivered, and yet that the price (in whole or in part) shall be payable only on the contingency of the goods arriving."

Applying the law as laid down in the foregoing cases, the rights of the parties may be summarised as follows:—

The respondent was entitled to keep and is bound to pay for the logs etc. delivered into Sucker Lake during the season of 1914, at the contract prices. It was competent to him, upon subsequent default, to reject the residue, but that refusal to accept must be taken as an election not to assert title to the logs. The respondent, not having possession, is not entitled to a lien for the amount overpaid by him; but the appellant is bound to repay it, because the overpayment was by way of advance, and not in any sense under a term of the contract vesting the right to it in the appellant on partial delivery or at any stage of the transit.

Owing to the course taken at the trial and acquiesced in, as shewn by the judgment and notice of appeal, the Court is relieved of the necessity of deciding whether the respondent is entitled to damages for non-delivery. The items objected to by the appellant in regard to the services of one of the respondent's men were properly allowed. The loss of the sinkers falls naturally upon the appellant, they being part of the logs undelivered. Apart from that, if the respondent had accepted what was delivered in the spring of 1915, subject to his claim for damages for late delivery, the result would be the same, as the sinkers were lost during the time when the appellant was in default. Their loss would be properly attributable to the retention in the water caused by the delay in delivery.

It may be noted that the provision in the English Sale of Goods Act, 1893, sec. 11 (1) (c.), that, where the property has passed to the buyer, the breach of any condition to be fulfilled by the seller can only be treated as a breach of warranty, and not as a ground for rejection, is conditional upon the contract of sale not being severable. In this case it is, as has been pointed out, severable in its nature, and was so treated by the parties.

The result is, that the judgment should be affirmed and the appeal dismissed with costs.

Since writing the foregoing, I have had the opportunity of reading the opinion of my brother Garrow. I regret that I am not able to agree with it in so far as it disregards the finding of the learned trial Judge that the bargain was to deliver during the season of 1914. If the terms of the contract were to be determined by what was probable under the circumstances, it would, I think, be most unlikely that, of all stipulations in a log contract, the time of delivery would be omitted. But in this case the finding is based not only upon explicit evidence given by the respondent and his son, but upon two admissions by the appellant. The appellant sought to qualify these admissions, and the value of his whole evidence was therefore properly a matter for the trial Judge. In addition to this consideration, there is the fact that the finding is not directly challenged in the notice of appeal, nor was it controverted before us. While, therefore, the appellant did all he could, I am unable to concur in the view that the contract contained no provision as to the time of delivery, or that, if it did, it was to be conditional on a sufficient supply of water being available.

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MAGEE, J.A., agreed with HODGINS, J.A.

Appeal allowed; MAGEE and HODGINS, JJ.A., dissenting.

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March 21.

Parent and Child—Liability of Parent for Maintenance of Forisfamiliated Infant—Oral Agreement—Implication—Breach—Parent Inducing Child to Leave Foster-home—Findings of Fact of Trial Judge—Appeal—Damages—Costs.

The judgment of *BOYD, C.*, 35 O.L.R. 36, was, upon the defendant's appeal, affirmed upon the question of his liability, but varied by reducing the plaintiff's damages to \$280, with costs of the action to the plaintiff on the County Court scale without set-off, and leaving each party to bear his own costs of the appeal.

APPEAL by the defendant from the judgment of *BOYD, C.*, 35 O.L.R. 36.

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February 29. The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, JJ.A.

J. H. Rodd, for the appellant, argued that the father had the right to re-take the custody of his child at any time, and was not liable for maintenance during the period of adoption, because there had been no contract, express or implied, calling for the payment of compensation—the learned Chancellor's finding of an implied contract being unwarranted. He relied upon *Farrell v. Wilton* (1893), 3 Terr. L.R. 232, and *Wright v. McCabe* (1899), 30 O.R. 390. In any event, the compensation allowed was too great.

R. L. Brackin, for the plaintiff, respondent, contended that the judgment appealed from was correct. The learned Chancellor had the right to draw the inference of an implied contract that the plaintiff should have the benefit of the boy's services after he should reach an age of usefulness; and, if the plaintiff should be deprived of them by the defendant, that the plaintiff should be compensated. The evidence justified the learned Chancellor's findings. The amount allowed was not excessive.

Rodd, in reply.

March 21. The judgment of the Court was delivered by MEREDITH, C.J.O.:—This is an appeal by the defendant from the judgment dated the 29th November, 1915, which was directed to be entered by the Chancellor, after the trial of the action before him sitting without a jury at Chatham, on the 18th day of that month: 35 O.L.R. 36.

The contest between the parties is as to the nature and legal effect of an arrangement that was entered into in the year 1902 between them with reference to a son of the appellant, who at that time was an infant less than two years old.

The appellant's wife died in August, 1902, and the parties met at his house when the funeral took place. He told the respondent's wife, who was an aunt of his wife, of the difficulty he was in owing to her death and there being left on his hands the care of his two children, the boy and an infant girl. The respondent's wife offered to take the boy and another relative to take the girl. Nothing was said as to the compensation the respondent was to receive for taking care of the boy, or as to any compensation being

paid; and the result of what took place would have been, if nothing further had occurred, that as a matter of law the respondent would not have been entitled to any compensation for taking care of and bringing up the boy.

The boy did not then go to the respondent, but was taken to him in the October following. On this occasion some discussion took place, the result of which was, as the Chancellor found: "The plaintiff was willing to keep the child for a year or so without pay until the defendant had time to settle his affairs; but, apart from that, the understanding expressed between them was, that the custodian should have the benefit of the work and services of the boy according as advancing age enabled him to render such services. The father said he would not give any writings; but, if the child was with the plaintiff for any length of time, it would not be right to take the boy away when he became of use on the farm."

This is, I think, a fair statement of the result of the evidence as to the arrangement.

It is clear that it was not intended that the appellant should have to pay for the support and upbringing of the boy in money; but it is equally clear that it was in the contemplation of the parties that the respondent should be compensated by having the benefit of the boy's services after he became old enough to render useful service to the respondent.

I have no doubt that a jury might properly infer from all that took place an agreement that the respondent should be compensated in that way, and that the appellant would do nothing to prevent the respondent from getting the benefit of the boy's services after he had attained an age when he would have become useful to him; and, if that be the case, the Chancellor, as judge of the fact as well as the law, might properly draw that inference, and having drawn it his finding ought not to be disturbed. It is also, I think, a fair inference that, if the appellant should take the boy away from or induce him to leave the respondent, he was to be compensated for his care of the boy and bringing him up.

The respondent doubtless took the risk of the boy dying before reaching an age when he would have become useful to the respondent, and also the risk of his proving useless when he had reached the age when he should have been useful; but, in my opinion, he

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did not take the risk of the boy, under the persuasion or compulsion of his father, leaving the respondent when he had become useful and his services would have been of value to the respondent.

The Chancellor found that the boy was induced by his father to leave the respondent. The basis for the finding was an offer the father had made to the boy to give him \$2,000 "if he would come back and stay with him" until he reached the age of 21. It was argued that that was not the real cause of the boy's leaving, and that the offer of \$2,000 was not made seriously but jokingly, and it was also argued that the time which elapsed between the making of the offer and the boy's leaving was so great that it was unreasonable to conclude that the offer was the inducing cause of his leaving.

All these considerations were doubtless urged upon the Chancellor, but without effect; and it is impossible for us to say that his conclusion was clearly wrong or one that might not reasonably be reached, especially as it is clear upon the evidence that the appellant was anxious to get the boy back to work on his farm, and that, ever since he left the respondent, he has been doing for his father what he ought to have been doing and what it was contemplated he would do for the respondent.

Much stress was laid by the appellant's counsel on the fact that about two years after his wife's death the appellant asked the respondent what he was going to "tax him," and that the reply was "nothing." There was nothing in this inconsistent with the arrangement having been what the Chancellor found that it was. If the boy had been taken away at that time, the respondent would have been saved the expense of bringing him up, and he might well say that under such circumstances he expected nothing for the two years' care that the boy had been given.

The remaining question is as to the damages. The Chancellor assessed them on the basis of reasonably remunerating the respondent for his care of the boy and bringing him up. He allowed nothing for the first two years, or the last three years, of the boy's stay with the respondent—for the first two years because of what was said in answer to the question as to how much the appellant was to be "taxed," and for the last three years because he thought the boy's services were sufficient compensation for those years. This left seven intervening years, for which he thought it

would be fair to allow at the rate of \$1.50 per week; and, after striking off the fraction over \$500, he assessed the damages at \$500.

I think that the damages were assessed upon too liberal a scale, and that, under the circumstances, \$40 a year on the average would be adequate compensation for the care and bringing up of the boy during the seven years for which the Chancellor thought that compensation should be allowed; and I would, therefore, vary the judgment by reducing the damages to \$280, but I would not disturb the disposition that was made of the costs of the action, which should be to the respondent on the County Court scale without set-off, and I would leave each party to bear his own costs of the appeal.

Judgment below varied.

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TOWNSHIP OF KING v. BEAMISH.

March 21.

Contract—Municipal Corporation—Oral Agreement for Lease of Land—Possession Taken and Gravel Removed—Part Performance—Statute of Frauds—Specific Performance—Completed Agreement—Term as to Survey and Preparation of Lease—Corporate Seal—Municipal Act, R.S.O. 1914, ch. 192, sec. 249.

Specific performance of an oral agreement for a lease by the defendant to the plaintiffs, a municipal corporation, of land with the right to take gravel therefrom, was adjudged, where there were acts of part performance by the plaintiffs in taking possession of the land and removing gravel from it, with the knowledge and consent of the defendant, which took the case out of the Statute of Frauds. In the eye of a Court of Equity, it is a fraud to set up the absence of agreement when possession has been given on the faith of it.

Wilson v. West Hartlepool R.W. Co. (1865), 2 DeG. J. & S. 475, and *Parker v. Taswell* (1858), 2 DeG. & J. 559, followed.

The agreement was not incomplete by reason of a term that a "survey or description" of the land which was the subject of the agreement should be made and a lease prepared by the plaintiffs' clerk. The subject was certain, and the meaning was that the clerk should ascertain the metes and bounds of the land in order that a description of it might be inserted in the lease.

For the same reason that the defendant was precluded by acts of part performance from setting up the Statute of Frauds, the plaintiffs were prevented from setting up the absence of a seal to two resolutions of their council authorising the making of the lease. The rule that part performance will prevent a company from setting up a defence grounded on the absence of a corporate seal, applies in the case of a municipal corporation, notwithstanding sec. 249 of the Municipal Act, R.S.O. 1914, ch. 192, providing for the exercise by by-law of the powers of a municipal council; and the defendant could not, on that ground, maintain that there was no agreement.

Waterous Engine Works Co. v. Town of Palmerston (1892), 21 S.C.R. 556, distinguished.

Judgment of the County Court of the County of York reversed.

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APPEAL by the plaintiffs from the judgment of DENTON, Junior Judge of the County Court of the County of York, dismissing an action, brought in that Court, for specific performance of a parol agreement alleged to have been entered into by them with the defendant on the 5th June, 1915, by which the defendant, in consideration of \$200 which they agreed to pay him, agreed to demise to them land in the township of King, for the term of eight years, with the right during the term to remove gravel from the land. The plaintiffs alleged acts of part performance by them sufficient to entitle them to have the agreement specifically performed notwithstanding the provisions of the Statute of Frauds, viz., taking possession of the land and removing gravel from it, with the knowledge and consent of the defendant.

February 28. The appeal was heard by MEREDITH, C.J.O., MACLAREN and MAGEE, JJ.A., and MASTEN, J.

McGregor Young, K.C., for the appellants, argued that sufficient part performance had been shewn to exclude the operation of the Statute of Frauds, and to entitle them to specific performance: *Cameron v. Spiking and Teed* (1877), 25 Gr. 116; *McLaughlin v. Mayhew* (1903), 6 O.L.R. 174.

W. T. J. Lee, for the defendant, respondent, contended that there was no sufficient part performance shewn to take the case out of the Statute of Frauds. No final and complete agreement had been proved, specific performance of which could be enforced: *Winn v. Bull* (1877), 7 Ch. D. 29; *Rossiter v. Miller* (1878), 3 App. Cas. 1124, at p. 1151; *Stow v. Currie* (1910), 21 O.L.R. 486; *Jones v. Daniel*, [1894] 2 Ch. 332. There was no assent under the appellants' corporate seal to the terms that had been agreed upon between the respondent and the members of the council who made the arrangement. See the Municipal Act, R.S.O. 1914, ch. 192, sec. 249.

Young, in reply, said that the respondent, having let the appellants into possession, and acquiesced therein, could not set up the want of the appellants' corporate seal. He also referred to *Bodwell v. McNiven* (1902), 5 O.L.R. 332, on the subject of part performance.

March 21. The judgment of the Court was delivered by MEREDITH, C.J.O.:—This is an appeal by the plaintiffs from the

judgment of the County Court of the County of York dated the 20th January, 1916, which was directed to be entered by a Junior Judge of that Court (Denton), after the trial before him, sitting without a jury, on the 14th January, 1916.

The appellants sue for specific performance of a parol agreement alleged to have been entered into by them with the respondent on the 5th day of June, 1915, by which the respondent, in consideration of \$200, which they agreed to pay to him, agreed to demise to them a part of lot No. 6 in the 11th concession of the township of King, containing one acre, which is described in the statement of claim, for the term of eight years, with the right during the term to remove the gravel in the land; and the appellants allege acts of part performance by them sufficient to entitle them to have the agreement specifically performed notwithstanding the provisions of the Statute of Frauds. These acts are, taking possession of the land and the removal of gravel from it, with the knowledge and consent of the respondent.

The facts are few and simple, and most of them not in dispute. The respondent was the owner of the one acre in question, which forms part of his farm, and the appellants were desirous of obtaining gravel for use on their roads. A member of the council, Mr. Kaake, by its direction, saw the respondent and discussed with him the question of obtaining gravel from his land. Mr. Kaake reported to the council that, as the fact was, the respondent was willing to sell the gravel, but not to sell it by the load.

At a meeting of the council, three of its members, the Deputy Reeve (Mr. Watson), Mr. Kaake, and Mr. Campbell, were authorised to negotiate with the respondent with respect to the gravel, and to enter into an agreement with him for the purchase of it for a lump sum, but no formal resolution was passed. These three members of the council, and Mr. Davis, its road overseer, met the respondent on the and on the 5th June, and an agreement was there come to that the respondent should lease to the appellants a part of his lot containing about an acre. The part of the lot to be leased was agreed on. It was bounded on two sides by fences, on the third side by the orchard, and on the fourth side the boundary was to be on the line of an elm tree which stood at the gateway. On the two unfenced sides the respondent was to put up fences. According to the testimony of witnesses called by

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the appellants, where there were no fences stakes were planted to mark the corners of the acre, but this was denied by the respondent. It was also agreed that a "survey or description" of the acre should be made by the Clerk, who was also to prepare the lease, and that the parties should meet at the office of the Clerk for the purpose of executing the lease, and that in the meantime the appellants should be entitled to enter upon the land and remove gravel from it, which it was arranged they might do on the following Tuesday.

The three members of the council, on the same day, reported to the council the arrangement they had made with the respondent, and the following resolution was passed by the council:—

"June 5th, 1915.

"Moved by A. Campbell, seconded by F. H. Robinson, that the Clerk be instructed to draw up a lease for the purchase of a gravel-pit owned by Victor Beamish, rear of lot 6, concession 11, for the sum of \$200, said lease to extend for a period of eight years, description of property subject to agreement by committee.

"W. J. WELLS,

"Reeve.

"Carried."

According to the respondent's testimony, which is, however, in conflict with that of the witnesses called by the appellants, the agreement was to be subject to the approval of the council, and it was arranged that Mr. Kaake should call him up by telephone that night and let him know the result of the council meeting. He admits that Mr. Kaake did this and said to him, "I guess we will take the gravel."

On the following Tuesday, Mr. Davis went on the land, opened a pit, and commenced to draw gravel from it, and continued to draw it until the then requirements of the appellants were satisfied, drawing in all several hundred loads. On the 23rd June, the following letter was written and sent by the respondent to Mr. Kaake:—

"Bolton, June 23rd, 1915.

"Mr. E. Kaake. Dear Sir. As I have got into trouble about opening that gravel-pit, I thought I had better drop you a few lines, as I never thought about the mortgage holder having any say in a thing like this. I have been notified to not allow any

more gravel to go out without his consent, and I think you had better call in and see E. C. Beamish, as he holds the mortgage, and if he thinks I had better fill up the pit, we will see what we can do, or if he will let it go out by the yard. Yours truly,

“V. Beamish,

“Bolton P.O.”

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At the first meeting of the council (after the 5th June), which took place on the 26th June, the following resolution was passed:—

“June 26th, 1915.

“Moved by J. A. Watson, seconded by E. J. Kaake,

“That the Reeve and Clerk be instructed to proceed at earliest possible date to execute lease according to agreement by Councillors Kaake, Campbell, and Watson, between Victor Beamish and the Township of King, for gravel-pit on lot 6, con. 11; and providing they do not come to terms of said agreement, said Reeve and Clerk to take steps to expropriate at once.

“W. J. Wells,

“Carried.”

The survey was made by the Clerk, and the lease was prepared by him, and was subsequently tendered to the respondent for execution, but he refused to execute it.

Mr. Watson explained that the council's purpose in adding the proviso in the resolution of the 26th June was to authorise steps to be taken to expropriate if the respondent should refuse to carry out his agreement, and he (Watson) was very positive that all the terms of the agreement were settled at the meeting of the 5th June, and that nothing remained to be done thereafter but to get the description of the land, to prepare and execute the lease, and to pay the \$200.

The learned Judge found it unnecessary to determine whether “no agreement was in fact arrived at,” by reason of the fact that “a survey and description had to be made and lease prepared;” his conclusion being that, even if that were found in favour of the appellants, they would not be entitled to succeed.

The basis for that conclusion was that acts of part performance to take a case out of the Statute of Frauds must be such as to render it a fraud in the vendor to take advantage of the contract not being in writing, and the learned Judge thought it impossible

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to say "that in this case the act of taking out this gravel creates a situation which would render it a fraud on the plaintiffs or render it unjust that the defendant should be allowed to take advantage of the statute."

I am, with great respect, unable to agree with that conclusion, which is, I think, based upon a misapprehension as to what is meant by "fraud" in the cases dealing with the effect of part performance.

It is quite true, in a sense, that the doctrine as to part performance is based upon the view that it is a fraud on the part of a vendor to set up the statute as a defence to an action for specific performance where there has been part performance of the contract by the purchaser, but what that means is, I think, well stated in Fry on Specific Performance, 5th ed., pp. 294, 295, paras. 585, 586, where it is said:—

"585. Secondly, the principle upon which the Court exercises jurisdiction in adjudging specific performance of parol contracts followed by a part performance, is the fraud and injustice which would result from allowing the party charged to refuse to perform his part, after performance by the other upon the faith of the contract and with the knowledge of the party charged. . . .

"586. 'Courts of Equity,' said Lord Cottenham, 'exercise their jurisdiction, in decreeing specific performance of verbal agreements, where there has been part performance, for the purpose of preventing the great injustice which would arise from permitting a party to escape from the engagements he has entered into upon the ground of the Statute of Frauds, after the other party to the contract has, upon the faith of such engagement, expended his money or otherwise acted in execution of the agreement. . . .'" *Mundy v. Jolliffe* (1839), 5 My. & Cr. 167, 177.

The view of the learned Judge is directly opposed to what was said by Turner, L.J., in *Wilson v. West Hartlepool R.W. Co.* (1865), 2 DeG. J. & S. 475, 492, 493. Referring to the doctrine of part performance he said: "It was contended on their" (i.e., the defendants) "part that companies are not bound by acts of part performance, and that the acts which have been done in this case furnish no equity against the defendants, because they are acts to the prejudice of the defendants only, and not of the plaintiff; but I cannot accede to either of these arguments.

Neither of them is, in my opinion, consistent with the principle on which this Court proceeds in cases of part performance. The Court proceeds in such cases on the ground of fraud, and I cannot hold that acts which, if done by an individual, would amount to a fraud ought not to be so considered if done by a company, nor can I say that it is no prejudice to the plaintiff to have been permitted to take possession on the faith of an agreement, and afterwards to be held liable to be treated as a trespasser and turned out of possession on the ground that there was no agreement. There is authority for saying that in the eye of this Court it is a fraud to set up the absence of agreement when possession has been given upon the faith of it."

Taking possession by the purchaser is an act of part performance; and, where a contract has been partly executed by possession having been taken under it, the Court will strain its power to enforce a complete performance: *Parker v. Taswell* (1858), 2 DeG. & J. 559, 571.

What amounts to taking possession under a contract must in all cases depend on the nature of the subject-matter of the contract. In the case at bar, the appellants entered into possession of the gravel-pit, which was the subject of the contract they had entered into, and dug for and removed several hundred loads of the gravel. It was not necessary, as it is in some cases where it is claimed that the title of the owner is by force of the Statute of Limitations extinguished, to shew continuous pedal possession. In order to exclude the operation of the Statute of Frauds, such a possession as the subject-matter of the contract admits of is sufficient—e.g., in the case of vacant land, entry upon it for the purpose of taking possession with the consent of the vendor is sufficient, although the purchaser does not remain upon the land but goes upon it only when he has occasion to do so.

As I have come to the conclusion that the judgment cannot be supported on the ground upon which it was based by the learned Judge, it is necessary to consider the other questions with which he did not deal.

I am unable to agree with the contention of counsel for the respondent that the agreement was incomplete by reason of the term as to the survey and description and the preparation of the

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lease. This is clear as to the term with regard to the preparation of the lease. If it were otherwise, an agreement for the sale of land which provides for the execution of the conveyance would be incomplete. All that was meant by the term that a survey or description of the land should be prepared by the clerk was, that he should ascertain the metes and bounds of the land in order that a description of it might be inserted in the lease. The subject of the demise was certain, and nothing remained to be done but to obtain by measurements a description of it for that purpose.

Without explanation, the resolution of the council would appear to indicate that an agreement had not been come to at the meeting with the respondent on the 5th June, and that the matter of the lease had not proceeded beyond the stage of negotiations; but, read in the light of the surrounding circumstances and the testimony of the Deputy Reeve, that is not the effect of the resolution.

There remains to be considered a further question, which does not appear to have been raised at the trial, viz., whether, because there was not assent under the appellants' corporate seal to the terms that had been agreed upon between the respondent and the members of the council who made the arrangement with him, there was no agreement.

In my opinion, this objection cannot prevail. For the same reason that the respondent is precluded by the acts of part performance from setting up the Statute of Frauds, the appellants are prevented from setting up the absence of a seal to the two resolutions of their council. It was held in *Wilson v. West Hartlepool R.W. Co.* (*supra*) that, where the purchaser had been let into possession under the contract, the vendors could not set up the absence of their corporate seal; and in *Fry on Specific Performance*, 5th ed., p. 323, para. 648, it is said to be "clear that such part performance as will prevent an ordinary defendant from setting up the defence of the Statute of Frauds, will prevent a defendant company from setting up either that defence or a defence grounded on the absence of the corporate seal, or of the statutory formalities, in accordance with which the company may be enabled to contract."

I see no reason why the same rule should not be applied in the case of a municipal corporation, notwithstanding the provision

of sec. 249 of the Municipal Act that, "except where otherwise provided, the jurisdiction of every council shall be confined to the municipality which it represents, and its powers shall be exercised by by-law."

In *Waterous Engine Works Co. v. Town of Palmerston* (1892), 21 S.C.R. 556, the contract was in respect of chattels, to which the doctrine of part performance does not apply, and that case is for that reason distinguishable.

I would for these reasons allow the appeal with costs, and substitute for the judgment which was pronounced, judgment for specific performance, with costs.

Appeal allowed.

[APPELLATE DIVISION.]

HUNT v. BECK.

Water—Floatable Stream—Improvements Made by Crown Timber Licensees—Rivers and Streams Act, R.S.O. 1914, ch. 130, sec. 3—Deprivation of Water—Freshet-water.

The judgment of BOYD, C., 34 O.L.R. 609, was affirmed (MAGEE, J.A., hesitating.)

Per GARROW, J.A.:—The plaintiffs' case failed, upon the evidence, because, the onus being upon them, they did not establish that the act of the defendants in putting the stop-logs in the dam retained from the plaintiffs the freshet-water to the use of which they were entitled, to an extent sufficient to interfere with the process then under way of floating the plaintiffs' logs down stream.

APPEAL by the plaintiffs from the judgment of BOYD, C., 34 O.L.R. 609.

January 24 and 25. The appeal was heard by MEREDITH, C.J.O., GARROW, MACLAREN, MAGEE, and HODGINS, J.J.A.

T. P. Galt, K.C., and *U. McFadden*, for the appellants, argued that the defendants had no right to deprive the appellants of the benefit of the spring and summer freshets, to which they were entitled under the Rivers and Streams Act, R.S.O. 1914, ch. 130. The defendants had, no doubt, the right to make works in the nature of storage dams to a reasonable extent; but the evidence shewed that they had gone far beyond what was reasonable. [MEREDITH, C.J.O., referred to *James v. Rathbun Co.* (1905),

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11 O.L.R. 271.] The right to the natural flow of the stream is the paramount right. The finding of the Local Judge (reversed by the Chancellor) is supported by the evidence and should be affirmed. Counsel referred to *Rainy River Navigation Co. v. Watrous Island Boom Co.* (1914), 6 O.W.N. 537; *Rainy River Navigation Co. v. Ontario and Minnesota Power Co.* (1914), 6 O.W.N. 533; *Farquharson v. Imperial Oil Co.* (1899), 30 S.C.R. 188. The whole matter in dispute was covered by the Act, and the learned Chancellor had practically reversed the trial Judge on his finding as to the facts of the case.

G. H. Watson, K.C., and *T. E. Williams*, K.C., for the defendants, the respondents, argued that their works were constructed in accordance with the law and were lawfully operated. It was impossible to say, in view of the evidence, that the defendants' action was the cause of the plaintiffs' failure to secure sufficient water. [MEREDITH, C.J.O., said the question was one of reasonable use, and referred to *Ellis v. Clemens* (1891), 21 O.R. 227.] Section 3, relied on by the plaintiffs, is the same section that gives us our rights. The onus is on the plaintiffs to make out their case, and they have failed to do so.

Galt, in reply, referred to the Act of 5 Geo. V. ch. 15 (O.), and to *Le Club de Chasse et de Pêche Ste. Anne v. Rivière-Ouelle Pulp and Lumber Co.* (1911), 45 S.C.R. 1, *per* Duff, J., at p. 33.

March 21. GARROW, J.A.:—Appeal by the plaintiffs from the judgment of the Chancellor on a motion by way of appeal from the report of a Local Judge, to whom the action had been referred for trial, in favour of the plaintiffs, allowing the appeal and dismissing the action. The case is fully reported in 34 O.L.R. 609, where the facts appear.

A great many reasons are given in the notice of appeal why the judgment should be set aside, but it is evident from the course of the proceedings and from the argument before us that the one supreme point in the case raises a pure question of fact and not of law, and that point is, did the act of the defendants in putting in the stop-logs in the dam at Carpenter Lake retain from the plaintiffs the freshet-water to the use of which they were entitled, to an extent sufficient to interfere with the process then under way of floating the plaintiffs' logs down stream? If that fact

has not been established, no question of law can possibly arise, and the plaintiffs' case must fail.

The burden of proof, of course, rested upon the plaintiffs. This they undertook to satisfy by calling a very large number of witnesses, much of whose evidence, describing experiences in other seasons and other more or less irrelevant matter, is really of very little use. The real matter is confined within narrow compass. The defendants admit putting in the stop-logs. The only dispute is whether they were put in on the 9th May or the 11th. The learned Referee held, upon the evidence, that the weight of evidence upon this point was with the plaintiffs. The learned Chancellor evidently considered it a matter of minor importance whether it was the 9th or the 11th.

My own impression, after reading the evidence, is that the learned Referee's conclusion as to the fact, that they were put in on the 9th, is probably correct, and that the circumstance, bearing as it does directly on the issue, is certainly one of sufficient importance to require it to be seriously considered, of course in conjunction with the other facts in evidence. The learned Referee, however, evidently treated it as crucial, which I think, carries its importance much too far. The real question is as to the probable condition of the spring freshet at the time the logs were placed in the dam by the defendants' servant—was it practically over then, or was it still in sufficient vigour to have accomplished the plaintiffs' purpose if left alone? If it was not, then the act was harmless. And it was, of course, harmless unless it can be said that not only was some freshet-water impounded, but that enough was so impounded as injuriously to interfere with the plaintiffs' operations. It is, of course, a circumstance of importance that the fall of the water and the placing of the logs in the dam synchronise, as it is said by the learned Referee, but not a conclusive, and it may even be a misleading, circumstance, unless the surrounding circumstances are examined with some care.

The circumstance of chief moment is, what was the actual condition of the water in the river for a few days before and immediately after the day when the logs were replaced in the dam, which I will assume was on the 9th? John McKay, the plaintiffs' foreman, was in charge. He says they were into the Thessalon

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river out of Wood's creek on the 6th May. There was fair water for driving for the first two days. After that it commenced to fall; "we were down to almost nothing at all . . . About the 9th or 10th May, along there." And the plaintiffs' case in this respect, upon the evidence, cannot be put any higher than it is placed by Mr. McKay's evidence.

On the 9th, Mr. Hunt says, he went upstream, leaving camp about 2.30 p.m., according to the evidence of Mr. McKay, the foreman, hunting for water. On the way he met the defendants' witness Tavell, the man who closed the dam. Tavell in his cross-examination says that Hunt told him when they met "that the water was all gone." And Hunt did not, when examined, so far as I can see, deny that he had made that statement. Tavell also said that he closed the dam between one and two o'clock p.m., and at that time very little water was flowing over the sill, not more than an inch, he considered; so little, in fact, as to make it quite impossible that it could have had any appreciable effect on the drive before Mr. Hunt left.

Mr. Hunt's statement apparently agrees in a general way with McKay's statement when he speaks of the water as sufficient only for the first two days, while by the 9th or 10th "along there, they were down to almost nothing at all"—a statement which seems to me to go a long way towards supporting the defendants' contention that the real trouble was not the closing of the dam, but that the spring freshet had practically ceased when the dam was closed.

Carpenter's creek is only one branch of the river Thessalon, and not even, on the evidence, the main branch. In addition, other streams empty into the river below the dam and above where the plaintiffs' logs were, such as Wood's creek and Cassidy's creek, the former slightly larger and the latter somewhat smaller than Carpenter's creek; and, in addition, there is the so-called main or northerly branch, about the volume or strength of which there still seems to be some mystery.

It would, of course, be nonsense to suggest that only Carpenter's creek carried freshet-water. If there was freshet-water in it, which is the plaintiffs' theory, there must have also been freshet-water in the other branches, all of which would reach the plaintiffs' logs unimpeded, together with the not inconsiderable

leakage which, the evidence shews, existed in the Carpenter's creek dam. So that, if something over one-half at least of the alleged freshet was still reaching the plaintiffs' logs, notwithstanding the closing of the dam, the language of both Mr. McKay and of Mr. Hunt, before referred to, would be at least inaccurate.

On the other hand, if the freshet for all useful purposes was then over, as I think, upon the evidence, it was, and the closing of the dam therefore practically harmless, what they deposed to would be quite in line with the other apparent facts.

I think the appeal fails and should be dismissed with costs.

MEREDITH, C.J.O., MACLAREN and HODGINS, JJ.A., concurred.

MAGEE, J.A.:—On the assumption that the plaintiffs in the spring of 1914 had only been able to float what logs they did by the aid of water stored by the defendants in their storage-dams, I would fully concur in the dismissal of the appeal. The evidence as to that would lead me to the opposite conclusion, as it did the trial Judge.

But, in the absence of direct evidence as to the closing of the defendants' dams being the cause of the stoppage of the water, and not the sudden failure of the spring freshets, I do not feel warranted in differing from the result arrived at by my colleagues, though I would have drawn the same inference as the trial Judge in the plaintiffs' favour.

I therefore agree, with considerable hesitation, in the result.

Appeal dismissed.

[APPELLATE DIVISION.]

TAYLOR v. VANDERBURGH.

Evidence—Title to Land—Possession—Presumption of Ownership—Rebuttal—Acts and Conduct of Predecessor in Title—Admissibility—Misrepresentation—Failure to Prove.

Statements by persons in possession of property qualifying or affecting their title thereto are receivable against a party claiming through them by title subsequent to the admissions; and the acts and conduct of a predecessor in title inconsistent with the existence in him of a right or title which a person who derives title from him is asserting, are also receivable.

It was held, in this case, which concerned a dispute as to the ownership of a strip of land, that the acts and conduct of the third party, the defendant's grantor, were receivable in evidence against the defendant; and that they, at all events when taken in connection with other circumstances, displaced

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the presumption of ownership arising from the defendant's possession of the strip, and entitled the plaintiff to succeed.

Per MAGEE, J.A.:—The plaintiff was in possession of the strip in 1911, when the defendant received his conveyance from the third party. Upon this possession, the defendant, without any authority, entered, and was *primâ facie* a trespasser. The burden of justifying his entry was upon the defendant; and any presumption which might arise in his favour by his alleged possession was displaced by the antecedent peaceable possession of the defendant.

Held, also, that the defendant had failed to establish any misrepresentation by the third party as to the extent of the land that he conveyed to the defendant.

Judgment of the County Court of the County of Lambton affirmed.

AN appeal by the defendant from the judgment of the Senior Judge of the County Court of the County of Lambton in favour of the plaintiff.

The facts are well stated in the following reasons for judgment.

January 17. MACWATT, Co. C.J.:—The plaintiff (James A. Taylor) claims to be the owner of the west half of the south half of the south half of lot No. 6 in the 1st concession of the township of Moore, in the county of Lambton, containing 25 acres more or less, and alleges that the defendant has taken possession of part of the said lands, containing 3.12 acres more or less.

This the defendant denies, and alleges that the said 3.12 acres are part of what he purchased as 25 acres of the east half of the said lot from the third party, John Shepherd.

On the 22nd October, 1897, Alexander Taylor et ux. conveyed by deed to the plaintiff the west half of the south quarter of lot No. 6 aforesaid, containing 25 acres more or less, which lands had been conveyed to Taylor on the 22nd May, 1885.

On the 26th August, 1901, Taylor conveyed to the third party (*inter alia*) the east half of the south half of the south half of lot No. 6 aforesaid, containing 25 acres more or less.

On the 20th May, 1911, the third party, by deed, conveyed to Harry Vanderburgh, the defendant, the east half of the south quarter of lot 6, containing 25 acres more or less. .

Exhibit 5 shews that there is a fence which runs from the town-line north to the boundary-line between the north and south halves of lot 6, and which has been there for about 30 years.

From exhibit 5—a rather informal and indefinite survey made for the plaintiff by Mr. Baird, P.L.S.—he shews that from where the fence is located to the easterly boundary of the west half of the

said lot there are 3.12 acres, which would leave only 21.88 acres in the westerly half, as it is in any case short, containing only 24.78 acres, thus shewing the lands west of the westerly boundary of the land conveyed to the defendant to the fence to be 3.12 acres, which are the lands in dispute.

In a similar informal and equally indefinite survey made for the defendant by Mr. Plater, P.L.S., he made the amount of land to be 3.22 acres. In his evidence the third party shews that he and the plaintiff, by tape measurement, found out that the line between the halves is as shewn by Baird and Plater, or thereabouts.

The defendant asserts that he purchased all the land within the fences, and not merely the 25 acres called for by his deed; and, if this be not established, he claims to be indemnified by the third party to the extent of the judgment and costs, if any, found against him. The third party says that he purchased 25 acres, and got that quantity, and no more, and those 25 acres he sold to the defendant, who inspected and examined the land before purchase.

The defendant claims title by possession; he contends that "25 acres more or less" covered the 3.12 additional acres; that the third party is liable to him because of misrepresentation; and that he is entitled in any case to be paid for his improvements.

The third party admits that, when he purchased in 1901, through a Mr. Talbot, the agent of the Western Real Estate Exchange Limited, of London, Ontario, after examining the land he imagined that he had purchased all within the fences. He bought in the same way as the defendant did, 25 acres more or less; and when, shortly afterwards, he found that his line did not come up to the westerly fence, but that he still had 25 acres, he was satisfied. He admits that there was nothing to indicate to a stranger that there was more than 25 acres in the part fenced. When the defendant and he went to examine the property, standing on his own land opposite to the property now the defendant's, he said to him, "There is the 25 acres." He just sold it as he bought it himself; he did not feel deceived when, after he bought, he found out that he was not getting all within the fences, as he did not care so long as he got 25 acres, which he did.

He admits that the defendant might have been misled; but he did not ask where the boundaries were.

Talbot, the agent who carried out the sale to the third party,

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as well as the one to the defendant, and was present when the latter examined the 25 acres, corroborates the third party as to what was said. Talbot says that nothing was mentioned about fences or boundaries—just “There is the 25 acres;” that he sold just the south-east quarter, containing 25 acres.

The defendant and the third party exchanged farms in the sale.

The defendant, it is clear, was purchasing only 25 acres, and he has got that quantity of land.

There is nothing in his claim of title by possession. He purchased only in 1911, and the third party, who got the property in 1901, never set up title to the 3.12 acres or to anything but the 25 acres.

I do not believe that the third party deliberately misled the defendant. He is a stolid sort of man, one who, knowing he had 25 acres, while he may have thought at first all within the fences contained 25 acres, just as soon as he found out to the contrary, was quite satisfied. He had bought 25 acres, and that quantity he had.

Apart from the fact that the third party never claimed title to the 3.12 acres, the plaintiff exercised acts of ownership over the lands up to the year 1911.

The plaintiff is also a stolid individual, and I am of opinion that he is too easy-going to take much trouble over anything. If this were not the case, the fence would have been placed on the true line years ago, when they taped the land.

The defendant is of a different temperament altogether—a keen man, and one who wants all he can get—as, while he knows he has 25 acres, and that was all he purchased, he wants the 3.12 acres in addition, because of the words “more or less.”

His claim that he will be greatly damaged if he does not get all within the fences, I am of opinion, is not a valid one. The loss of 3.12 acres of pasture-land, in the state it is now in, will not injure him nearly as much as it would the plaintiff, who only has 24.78 acres in the quarter he owns; so, if the 3.12 acres were deducted, he would have only 21.66 acres for his south-west quarter, instead of 25 acres.

(1) I find as a fact that the defendant is not entitled to possession of the land within the fences, amounting, as is said, to 28.12 acres, but only to 25 acres thereof.

(2) That the plaintiff is entitled to possession of the 3.12 acres within the fences as described in the statement of claim and exhibit 5.

(3) That the defendant has full 25 acres in his possession, and that the correct line will shew this.

(4) That the third party was not guilty of misrepresentation.

(5) That the defendant is not entitled to anything for improvements, as, while he erected part of a new fence, I direct the plaintiff, at his own expense, to remove the fence to the true line as found by Mr. Baird, which will affect the defendant's expenditure.

The claim of title by possession I can hardly believe was set up by the defendant with any hope of success.

He got title to the lands in May, 1911, and his predecessor in title, the third party, who obtained title in September, 1901, never claimed or set up title in any shape or form, but in fact repudiates the idea.

The plaintiff has all along exercised acts of ownership openly and freely without let or hindrance from any one, such as pasturing his cattle, and cutting down the timber. The land being vacant, no claim can be set up such as was made in *Coffin v. North American Land Co.* (1891), 21 O.R. 80, which has been overruled by *Piper v. Stevenson* (1913), 28 O.L.R. 379. The plaintiff never abandoned the land. Abandonment is a matter of intention: *Piper v. Stevenson, ante.*

The paper title has been proved and admitted. The Supreme Court of Canada in *Sherren v. Pearson* (1887), 14 S.C.R. 581, at p. 585, laid down that "to enable the defendant to recover he must shew an actual possession, an occupation exclusive, continuous, open or visible and notorious for 20 (10) years. It must not be equivocal, occasional, or for a special or temporary purpose."

As to the words "more or less" covering the 3.12 acres, I am of opinion that the cases are clear that the defendant can make no such claim. He purchased 25 acres, and that he has got. Further, his deed calls for the east half of the south-west quarter of lot 6, 25 acres, and that he has got.

In *Wilson Lumber Co. v. Simpson* (1910), 22 O.L.R. 452, it was held that, while there was a deficiency of 11 feet 6 inches in the depth of the land sold, 98 feet 6 inches instead of 110 feet, the

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purchase-price being a bulk sum, not a price per foot, the words "more or less," added to the statement of the depth, controlled that statement, so that the plaintiffs were not entitled to compensation for the deficiency—the difference not being so great as to raise the presumption of fraud or gross mistake.

[The learned Judge then quoted from the judgment of Sir William Meredith, C.J.C.P., in that case, at pp. 458 and 459, and referred to the affirmance of it by a Divisional Court (1911), 23 O.L.R. 253.]

In *Flight v. Booth* (1834), 1 Bing. N.C. 370, the rule is stated as follows, at p. 377: "In this state of discrepancy between the decided cases, we think it is, at all events, a safe rule to adopt, that where the misdescription, although not proceeding from fraud, is in a material and substantial point, so far affecting the subject-matter of the contract that it may reasonably be supposed, that, but for such misdescription, *the purchaser might never have entered into the contract at all*, in such case the contract is avoided altogether, and the purchaser is not bound to resort to the clause of compensation."

In my opinion, the purchaser would have entered into the contract even if he had known that all within the fences was not to be conveyed to him. He was *exchanging* his land for 25 acres, and got what he contracted for, 25 acres.

On the question of misrepresentation, the learned Judge referred to Dart on Vendor and Purchaser, 5th ed. (1876), p. 103; *Hamilton v. Margolius* (1914), 28 W.L.R. 504; Halsbury's Laws of England, vol. 20, paras. 1647, 1648, 1650, 1651, 1674, 1682; *Derry v. Peek* (1889), 14 App. Cas. 337, 375, 380; *Heilbut Symons & Co. v. Buckleton*, [1913] A.C. 30; *Nocton v. Lord Ashburton*, [1914] A.C. 932; *Evans v. Collins* (1844), 5 Q.B. 804; *Richardson v. Silvester* (1873), L.R. 9 Q.B. 34, 37; *Marnham v. Weaver* (1899), 80 L.T.R. 412, 413.

There will be judgment for the plaintiff for the possession of the lands described in the statement of claim and exhibit 5, consisting of 3.12 acres, being the quantity of land between the fence to the west and the true westerly line of the east half of the south quarter of lot 6 in the 1st concession of Moore.

The plaintiff is ordered to move the fence from its present position, running north and south to the true line as found by Mr. Baird.

The defendant is not entitled to anything for improvements.

I have carefully considered the question of costs, and can see no reason why they should not go in the usual manner. The defendant will, therefore, pay the costs of the plaintiff and of the third party.

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March 2. The appeal was heard by MEREDITH, C.J.O., MACLAREN and MAGEE, JJ.A., and RIDDELL, J.

A. *Weir*, for the appellant, while contending that the defendant had had possession of the land in question by himself and predecessors in title so long as to extinguish the title of the owner, relied more upon the argument that the plaintiff had failed to prove title to the land; and that, therefore, the defendant's presumption of ownership arising from possession was intact, and formed *prima facie* evidence of ownership, which had not been rebutted. He also argued that, if the plaintiff was entitled to recover, the defendant should be awarded damages from the third party, from whom the defendant had purchased, because the defendant had been given to understand that he was purchasing all the land between the fences; and the third party was thus guilty of misrepresentation.

W. N. *Tilley*, K.C., for the plaintiff and the third party, respondents, argued that the judgment appealed from was right and should be affirmed, and relied upon the reasons given by the learned County Court Judge and the authorities cited by him. As to the claim of possession under the Statute of Limitations, the third party, through whom the defendant claims, never alleged title to the 3.12 acres in question. The presumption of ownership, if any, of the appellant, was displaced by the evidence of the third party disclaiming any title in himself or any one deriving title through him. The learned trial Judge had rightly dismissed the claim of misrepresentation by the third party.

Weir, in reply.

March 21. MEREDITH, C.J.O.:—This is an appeal by the defendant from the judgment of the County Court of the County of Lambton, dated the 17th January, 1916, which was directed to be entered by the Senior Judge of that Court, after the trial of the action before him, sitting without a jury, on the 14th and 15th days of the previous month of December.

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The contest between the appellant and the respondent Taylor is as to the ownership of a strip of land, 142 feet wide, which forms part of the south half of the south half of lot number 6 in the 1st concession of the township of Moore, and the action is brought by the respondent Taylor to recover possession of it, the allegation of the statement of claim being that he is the owner of it and that the appellant took possession of it in May, 1911, and has wrongfully held possession of it since that time. The appellant defends, alleging that he is in possession of the land and has had possession of it by himself and those under whom he claims for a period long enough to extinguish the title of the owner.

The defence based upon the Statute of Limitations entirely failed and was not seriously pressed upon the argument before us; but it was contended by counsel for the appellant that his possession was *primâ facie* evidence of ownership, and that the presumption of ownership arising from his possession was not rebutted, because, as was contended, the respondent Taylor had failed to prove title to the land. Counsel for the appellant also contended that, if the respondent Taylor was entitled to recover, the appellant was entitled to damages from the respondent Shepherd, upon whom a third party notice claiming damages for deceit was served.

The south half of the south half of lot 6, containing 50 acres, was owned by Alexander Taylor, who conveyed to the respondent Taylor, on the 22nd October, 1897, the west half of it, and to the third party on the 26th August, 1901, the east half of it, which the third party conveyed on the 20th May, 1911, to the appellant.

At the time of the conveyance to the third party, there was a fence which ran from the front to the rear of the land parallel to the side lines of the lot. This fence was not, as the respondents contend, on the dividing line between the east and west halves, but 142 feet east of it, and it is the strip of land between this fence and that dividing line as to which the controversy has arisen.

There was a fence on the east boundary of the fifty acres when the third party purchased, and for some years before. It was the boundary-line fence between the 50 acres and the lot to the east of it, and was recognised by all parties interested as marking the easterly boundary of the 50 acres, and appears to have been so treated by the appellant ever since he acquired the east half of the 50 acres.

I agree with the contention of the learned counsel for the appellant that the appellant's possession of the land in question afforded evidence of his ownership, entitling him to succeed, unless the presumption of ownership arising from his possession was rebutted.

It was shewn conclusively that, although the third party at first thought that the land conveyed to him extended to the west fence to which I have referred, when informed that it did not, and that that fence was not upon the dividing line between the east and west halves of the 50 acres, he acquiesced; and that, while he continued to be the owner of the east half, the strip of land in question was treated and dealt with as, and acknowledged by the third party to be, the property of the respondent Taylor.

Statements by persons in possession of property, qualifying or affecting their title thereto, are receivable against a party claiming through them by title subsequent to the admission: Phipson on Evidence, 5th ed., p. 224.

For the same reason that such statements are receivable, the acts and conduct of a predecessor in title inconsistent with the existence in him of a right or title which a person who derives title from him is asserting, are receivable; and, if that be the case, the acts and conduct of the third party to which reference has been made, were receivable in evidence against the appellant; and I am of opinion that they, at all events when taken in connection with the existence of the easterly fence and the recognition of that fence as being the line fence on that side of the lot, displaced the presumption of ownership arising from the appellant's possession, and entitled the respondent Taylor to succeed.

I agree with the learned County Court Judge as to the disposition of the claim against the third party, and can usefully add nothing to the reasons which he gives for the conclusion to which he came on that branch of the case.

I would affirm the judgment and dismiss the appeal with costs.

MACLAREN, J.A., and RIDDELL, J., concurred.

MAGEE, J.A.:—It is, I think, clear that the plaintiff was in possession of the parcel in dispute at the time, in 1911, at which the defendant obtained the deed from Shepherd of the east half of

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the south quarter of lot No. 6. The fence which the defendant seeks to have recognised as his west boundary was never intended as or considered to be a boundary fence between the east and west halves. It was put up by the plaintiff's father, before 1897, simply as a field fence at the back of his clearing in front, that is, at the west side of the then existing bush. The plaintiff had possession of both halves when Shepherd bought the east half in 1901 from the plaintiff's father. Shepherd never claimed the parcel in dispute but always recognised the plaintiff's ownership of it. This was known by the neighbour upon the north, and evidenced on the ground by Shepherd's new wire fence along the town line road at the south, extending only as far as the line claimed by the plaintiff, and being there joined by a rail-fence in front of the plaintiff's land, while at the north side it was shewn by Shepherd's newly repaired fence being made one rail higher than the plaintiff's where they joined at the same line—and trees nearest to the line being blazed under the direction of Shepherd and the plaintiff after they had satisfied themselves by measurement where the line should be. The land between that line and the clearing fence was recognised by both to be the plaintiff's, and the burden of repairing the whole of that fence was borne by the plaintiff and not half by Shepherd. He cut wood and timber upon it as late as March, 1911, two months before the defendant brought the pastured cattle upon it each year, which, by arrangement, were allowed to roam over Shepherd's twenty-five acres, in return for Shepherd's cattle being allowed to go upon the three acres. In all respects the plaintiff was as much in possession of that three acres as of the remaining twenty-two acres of his half. Being in possession was *primâ facie* proof of his ownership without further evidence of the location of the exact boundary-line. Upon this possession, the defendant, without any authority, entered, and was *primâ facie* a trespasser. The burden is upon him to justify this disturbance of the existing state of things; and any presumption which might arise in his favour by his alleged possession is displaced by the antecedent peaceable possession of the plaintiff which he interfered with. Apart from the admissions of the plaintiff's title by Shepherd, the defendant's predecessor in title, to which my Lord the Chief Justice has referred, the plaintiff has the advantage of peaceful enjoyment shewn as exist-

ing at the time when the defendant came upon the scene and disturbed the *status quo*.

As regards Shepherd, whom the defendant has brought in as a third party, he only conveyed and only professed to convey the east half of the south quarter. If the defendant claims that he has not the enjoyment of that which was so conveyed, the burden is upon him to shew the true boundary, and he certainly fails to shew that it extended beyond the line recognised as the east boundary of the plaintiff's land. The evidence failed to establish any representation by Shepherd that it extended beyond that, or was all fenced, or included more than the twenty-five acres which the defendant has.

One cannot regret that the defendant's too keen desire to acquire other people's property should result in his having to bear the costs of the action and of the appeal.

I agree that the judgment should be affirmed.

Appeal dismissed with costs.

[APPELLATE DIVISION.]

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Trusts and Trustees—Payments by Trustee out of Trust Fund in Fraud of Trust—Agreement between Husband (Trustee) and Wife—Misapplication of Fund in Payment of Debts of Wife—Volunteer—Breaches of Trust—Liability of Wife to Make Good—Account—Interest—Annual Rests.

Where it was proved that there was an agreement between the defendant's husband, the trustee of a fund, and the defendant, that a breach of trust should be committed; and the fraudulent conversion of the debenture which they had in contemplation was ultimately carried out, and the money realised from it was used to discharge a debt for which the defendant was liable, or to repay moneys borrowed by her and her husband to pay for company-shares which belonged to her, though they stood in her husband's name:—

Held, that the defendant was liable to make good the breach of trust.

In respect of other moneys taken from the trust fund and used to pay debts of the defendant, what was done amounted to a gift to the defendant of the portion of the fund so applied; and the defendant was, therefore, a volunteer, and was bound by the trust impressed on the money so applied, even if she had no knowledge that the money was trust money, and she was liable to make good to the trust the money taken from it.

In taking the account, the defendant was charged with interest at five per cent. per annum with annual rests; for it was the duty of the trustee to invest the money which he misapplied; and, if he had done so, the investment would have produced five per cent. compound interest.

Gilroy v. Stephens (1882), 51 L.J. Ch. 834, followed.

Owen v. Richmond, [1895] W.N. 29, not followed.

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APPEAL by the plaintiff from the report of a Local Judge, to whom, by the judgment at the trial, the whole action was referred, under sec. 65 of the Judicature Act.

October 22, 1915. The appeal was heard by LENNOX, J., in the Weekly Court at Toronto.

R. T. Harding, for the plaintiff.

R. S. Robertson, for the defendant Mary Mathieson.

November 13, 1915. LENNOX, J.:—The only question in dispute in this action now is as to the sum for which the defendant Mary Mathieson should be made personally liable. By the report in appeal it is found that the estate of John Hugh Mathieson is indebted to the plaintiff in the sum of \$16,105.25—counting interest only to the 1st November instant. The plaintiff claims that the defendant Mary Mathieson (it will be convenient to refer to her as the defendant) should be held liable for the whole of this indebtedness.

The learned Judge at London, to whom this action was referred, reports the facts very fully and specifically; and, with one exception hereinafter referred to, I find no reason to object to any of the learned Judge’s findings of fact.

With very great respect, however, I am of opinion that, in addition to the sums for which the defendant is found to be liable by the report, the learned Judge should have found the defendant personally liable for the following sums of money, namely:—

1907, Jan. 4.	Part proceeds of debenture of the London and Erie Company applied upon a promissory note of the defendant and her husband, John Hugh Mathieson.....	\$5,230.00
1912, Mar. 23.	To paid Avern Pardoe for defendant out of trust funds.	503.00
“ May 4	“ “ “ “ “	623.00
“ July 8	“ London and Erie “	1,343.00
Making a total additional liability of		\$7,699.00,

with interest upon those several sums at five per cent. per annum computed with annual rests from the dates at which they were

respectively paid out of the trust fund by the deceased John Hugh Mathieson.

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As to the last three of these items the learned Judge finds that they were all paid out of trust funds and in breach of the trust by the defendant's husband and were applied upon debts owing by the defendant and for her benefit—the \$1,343 in discharge of a mortgage upon her property, and the indebtedness to Pardoe being secured upon shares of stock held by the defendant—but that the payments were made “without her prior knowledge or procurement,” and for this reason the learned Judge finds that the defendant is not liable for their repayment—basing his conclusion of law upon *Ewart v. Steven* (1871), 18 Gr. 35. In that case, and in all the cases referred to in support of it, the misappropriating trustee was not only acting without authority, express or implied, to commit his *cestui que trust* to an obligation, but, what was more important still, he was under a legal and moral obligation to make the payments complained of, and the judgments all proceeded upon the ground, as stated by Mr. Justice Gwynne in *Ewart v. Steven*: “These moneys being so applied for the benefit of the Steven estate, made the *cestuis que trust* of that estate purchasers for value without notice.” With deference, I am of opinion that all this is clearly distinguishable from a case in which, as here, an insolvent husband makes a purely voluntary gift of trust moneys to his wife.

I attach no weight to the argument that John Hugh Mathieson was a constructive trustee of his wife's money as well. He was her agent, and without means of his own, as the defendant well knew, and they were jointly engaged in reckless speculation upon borrowed money at short dates. The defendant up to a certain point is a shrewd, capable woman, and interested herself in and intermeddled with the trust estate and kept track of it—to some extent at all events. Her letters, before this litigation arose, prove this. Her letters written after the litigation shew that she was familiar with his system of book-keeping and with the trust account, and his system, as far as it affected the *cestui que trust*, was peculiar, deceptive and fraudulent. She did away with or refused to produce books important to a full revelation of the dealing of the husband and wife *inter se*, and touching the trust funds. She had

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already joined with her husband in, in fact had seemingly induced him to commit, breaches of trust—the circuitous so-called loan to the plaintiff and the loan to Mrs. Tytler. With all this knowledge, she mixed and mingled the trust moneys with her own, for with her knowledge and consent they were deposited in the same bank account. Out of this account from time to time moneys were drawn as required or desired for any purpose, for living expenses, speculation, or as might be. There is very strong reason to suspect that she and her husband made this trust money, for any and all purposes, their own—for the time being only, of course, and intending no doubt to make it good when the time for accounting came around, and they had amassed fabulous fortunes, as they hoped—although this is not in terms found by the report. This does not, in my opinion, afford a close analogy to the cases relied upon.

Of some of this, however, the transaction by which the Huron and Erie debenture was fraudulently misappropriated gives some indication. The defendant or her husband purchased as a speculation a block of the capital stock of the Superior Portland Cement Company. They borrowed the money to do this from a bank upon their joint promissory note at three months. When it became due, there was no money, and it was renewed for a month, and when it again became due it was again renewed for twelve days, and at the end of this time almost the total proceeds of the trust debenture, \$5,230, was applied in part payment of this joint promissory note.

The learned Judge says: “The defendant Mary Mathieson, when she made the said promissory note for \$10,500, had reason to know that it was the intention of the said John Hugh Mathieson to use the said sum of \$5,400 (the trust debenture) in part payment of the said note: but I find that the said defendant Mary Mathieson is not liable to the plaintiff for the said sum of \$5,400 so lost as aforesaid.”

Even if I regard this as the only instance in which the defendant joined with the trustee in committing a breach of trust—and it is not—and whether I regard the stock as purchased for the trustee or for the defendant and put into the trustee’s name to qualify him as a director, as the defendant specifically declared at the time—and the whole circumstances of the case point to this conclusion—I am unable to concur in the conclusion of law come

to by the learned Judge: Halsbury's Laws of England, vol. 28, p. 204, note (n); *Barnes v. Addy* (1874), L.R. 9 Ch. 244; *Pannell v. Hurley* (1845), 2 Coll. 241. The law of *Bank of Montreal v. Stuart*, [1910] A.C. 120, does not alter the facts.

The written statements of the defendant after her husband's death, the mixing of the funds, the suppression of the books, and the way in which the defendant's testimony has been characterised, are important elements in the consideration of the matters in issue; but I find it unnecessary to discuss them.

There will be an order amending the report as above set out, with costs of the motion to be paid by the defendant out of her own funds.

The defendant Mary Mathieson appealed from the order of LENNOX, J.; and the plaintiff also appealed by way of cross-appeal.

January 25, 26, and 27. The appeal and cross-appeal were heard by MEREDITH, C.J.O., GARROW, MACLAREN, MAGEE, and HODGINS, JJ.A.

R. S. Robertson, for the appellant, referred to the following authorities: *Mercier v. Mercier*, [1903] 2 Ch. 98; *In re Flamank* (1889), 40 Ch.D. 461; Halsbury's Laws of England, vol. 28, pp. 57, 61; *Regina v. Barry* (1865), 4 F. & F. 389; *In re Hallett & Co., Ex p. Blane*, [1894] 2 Q.B. 237; *Stokes v. Prance*, [1898] 1 Ch. 212; *Taylor v. London and County Banking Co.*, [1901] 2 Ch. 231; *Taylor v. Blakelock* (1886), 32 Ch.D. 560; *Molsons Bank v. Corporation of Brockville* (1880), 31 U.C.C.P. 174, 179; *Attorney-General v. Alford* (1855), 4 De G.M. & G. 843.

R. McKay, K.C., and *R. T. Harding*, for the respondent, referred to the following authorities: *Fyler v. Fyler* (1841), 3 Beav. 550; Halsbury's Laws of England, vol. 28, pp. 204, 205, 90, 91; Lewin on Trusts, 12th ed., pp. 1099, 1150, 1152, 1153; *Wilson v. Moore* (1832), 1 My. & K. 126, 143; *Small v. Eccles* (1865), 12 Gr. 37; *Wiard v. Gable* (1860), 8 Gr. 458; *Wightman v. Helliwell* (1867), 13 Gr. 330; *In re Barclay*, [1899] 1 Ch. 674, 684.

[The cross-appeal was dismissed at the hearing.]

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March 21. The judgment of the Court was delivered by MEREDITH, C.J.O.:—This is an appeal by the defendant Mary Mathieson from the order of Lennox, J., dated the 13th November, 1915, varying the report dated the 8th October, 1915, of the Senior Judge of the County Court of the County of Middlesex, to whom, by the judgment at the trial, dated the 29th March, 1915, the whole action was referred, under sec. 65 of the Judicature Act. There was also a cross-appeal by the plaintiff, which was dismissed after the argument.

Both the appellant and the respondent appealed from the report, and by the order now in appeal the appeal of the now respondent was allowed as to certain items of his claim and dismissed as to the other items, and the appeal of the now appellant was dismissed.

The present appeal is against the order in so far as it varied the report of the Referee and dismissed the appeal of the now appellant.

It will be convenient to deal first with the items which were the subject of the appellant's appeal from the report. These items were two in number, one of \$1,900 and the other of \$206, for which the Referee found that the appellant was answerable, and which he directed to be set off against a mortgage from the respondent to the appellant.

I entirely agree with the conclusion of the Referee on this branch of the case, and cannot usefully add anything to the reasons assigned by him for coming to his conclusion.

The other items in controversy are:—

(1) A sum of \$5,230, the proceeds of a debenture of the Huron and Erie Savings and Loan Company which the appellant's husband held as trustee for the respondent, and which were applied by the husband in part payment of a promissory note for \$10,500, made by him and the appellant (or a renewal of it), which was discounted at one of the banks, the proceeds being used to pay for shares in the Superior Portland Cement Company.

(2) A sum of \$503 belonging to the trust, which was applied on the 23rd March, 1914, to pay a debt of the appellant.

(3) A sum of \$623 belonging to the trust, which was applied in like manner on the 12th May, 1914.

(4) A sum of \$1,347 belonging to the trust, which was applied on the 9th May, 1912, towards the payment of a mortgage made by the appellant on lands belonging to her.

That these moneys belonged to the trust and were applied in the manner I have just mentioned is not open to question, and it was so found by the Referee.

The Referee finds as to the first of these items, and there is ample evidence to warrant his finding, that the appellant was present at various interviews with the agent of the Superior Portland Cement Company who solicited the subscription for the shares and knew all the details of the investment, and that in a discussion between the appellant and her husband as to paying for the shares, as they had not "ready cash," mention was made of a debenture of the Huron and Erie, "which would represent about one-half of the obligation," and some property that could be mortgaged.

The appellant denied that this took place, but her denial was not believed by the Referee, who considered the testimony of Ryan that it did take place "more worthy of credence than the defendant."

What was proposed to be done, viz., to provide one-half of the money required to pay for the shares by means of the Huron and Erie debenture, was subsequently done—the debenture was converted into money, and the money was used, as I have said, in part payment of the note by the discount of which the money to pay for the shares was obtained, or a renewal of it.

It is not suggested that the debenture spoken of in the discussion between the appellant and her husband was any other than the debenture which belonged to the trust fund.

There is therefore proved an agreement between the husband, the trustee of the fund, and the appellant, that a breach of trust should be committed; and the fraudulent conversion of the debenture which they had in contemplation was ultimately carried out, and the money realised from it was used at all events to discharge a debt for which the appellant was liable, if not to repay money borrowed by her and her husband to pay for shares which belonged to her, though they stood in her husband's name.

It is to me a startling proposition that on this state of facts the appellant is not liable to make good the breach of trust.

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It was argued on her behalf that the arrangement, if made, was that the money to be raised should be raised either by the conversion of the debenture or by the mortgage of property, and that the appellant may well have believed that the money that was paid was raised on mortgage.

There are several answers to this contention. In the first place, the discussion was as to raising only one-half of the money by means of the debenture, and the other half on mortgage; the mortgage was to be of the appellant's property, and the mortgage which she gave on her property was for \$5,000 only. She therefore knew that the remainder of the money was not raised on mortgage, and the irresistible inference is that she must have known that it was raised in the way it had been arranged that it should be raised. The mortgage for \$5,000 was made for the purpose of paying off the last renewal of the note given for the money borrowed to pay for the shares, which had been reduced by that time to \$4,700, and this renewal note was paid out of the mortgage loan. The proceeds of the loan (\$4,870) were deposited by the husband to the credit of his banking account on the 24th July, 1907, and the note for \$4,700 was charged to his account on the following day. Before this deposit and debit, the amount at the credit of the husband in the account was \$244.88. These facts afford, to my mind, conclusive evidence that the arrangement as to paying for the shares was carried out in its entirety.

It was also argued on behalf of the appellant that she thought that the note, except so much of it as was paid out of the loan on the mortgage, was paid out of moneys of her own which her husband had in hand; but there is nothing to warrant any such conclusion. The appellant was intimately acquainted with her husband's affairs, and must have known that there was no money available from that source; and, in my opinion, she could not escape from the consequences of the breach of trust which she and her husband had agreed to commit and which was committed, unless she could shew clearly that it had been afterwards arranged that the contemplated breach of trust should not be committed, and that the money which it had been intended to obtain by means of it should be provided in some other way; and that she has not done.

With great respect, I think that the learned Referee erred in

accepting the denial of the appellant of all knowledge of or participation in the misapplication of the debenture, in the face of the evidence and the circumstances which warrant the conclusion that she not only knew of but actively participated in it; the denial, too, of one whose testimony in other respects he did not believe, and whom he found to be an untruthful and dishonest woman; and, if it were necessary, in order to fix the appellant with liability in respect of the debenture, which, in my opinion, it is not, so to find, I should be prepared to find that she not only knew of and acquiesced in the fraudulent conversion of the debenture to her own and her husband's use, but conspired with her husband to convert and misapply it.

Then with regard to the other items. It is undoubted that the money was in each case taken from the trust fund and was used to pay a debt, in the fourth case a mortgage-debt, of the appellant.

While it is true that the respondent would not be entitled to follow these moneys in the hands of the creditors of the appellant to whom they were paid, because in that case the creditors would be in the position of transferees for value, unless he were able to shew that they had notice that the moneys were trust moneys, the respondent is, in my opinion, entitled to recover them from the appellant, if she was, as I think she was, *quoad* the transactions, a volunteer: Jarman on Wills, 12th ed., pp. 1099, 1100, and cases there cited.

What was done in this case was, in substance and effect, to make a gift to the appellant of so much of the trust fund as was applied in payment of her debts; and the appellant was, therefore, a volunteer, and is bound by the trust which was impressed on the money which was so applied, even if, which I very much doubt, she had no knowledge that the money which was being applied to pay her debts was trust money. Indeed, notwithstanding her denial, for the reasons I have given in dealing with the first item, it properly may be found, I think, that she had that knowledge.

It was argued by counsel for the appellant that her husband was indebted to the appellant for money of hers which he had received and should have had in his hands available to pay the sums which he paid on her account and which she has been held to be liable to repay. If such a case had been made out, it is at

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all events probable that the appellant would have been entitled to succeed as to these items; but she has, I think, entirely failed to make out such a case.

It is not open upon the evidence to doubt that the appellant and her husband were engaged in speculations in stocks, that these speculations were large transactions, and that, in most if not in all cases, they resulted in the loss of all that had been invested. An examination of the bank account of the husband shews that, although considerable sums which were the proceeds of sales of the appellant's lands, were from time to time deposited to the credit of the account, the balances of the husband, at his credit, were generally small, and in some cases were debit balances, and that the credit side of the account was largely made up of items representing the proceeds of notes discounted. In December, 1905, and in 1906, fourteen notes were discounted; in 1907, eleven; in 1908, thirteen; in 1909, four; in 1910, five; in 1911, four; and in 1912 and 1913, fourteen—some of them, no doubt, renewals. These notes were produced at the trial before the Referee. All of them were joint, or joint and several, promissory notes of the appellant and her husband, and on all of them, except one for \$250 dated the 24th August, 1912, the appellant's signature is the first. Many of the notes were for small sums (one of them for \$50) and most of them at short dates. Several of them were demand notes—two of them appear to have been held over by the bank for a considerable time before they were paid, and one of these appears to have been paid by instalments.

A perusal of the bank account leads to the conclusion that it was the account of a man who was chronically "hard up" and was "driven from post to pillar."

It is impossible for me to believe that a woman having the business ability the appellant possesses, and having the knowledge, as she admits she had, that her own and her husband's money went into this account, was not fully alive to the condition of her husband's finances, and well aware that her money was being used for the purposes of speculating in stocks and was lost in these speculations; and I have no hesitation in coming to the conclusion that she well knew that she had no claim against her husband for the money of hers which had been paid in to the credit of his banking account, and that he had no money of hers in his hands to make the payments that are in question.

If these conclusions are warranted by the evidence, the position of the appellant in respect of the moneys applied in payment of her debts is that of a volunteer, and she is bound to make good to the trust estate the money which was taken from it to pay them.

There remains to be considered the question as to the manner in which the account against the appellant is to be taken. By the order of my brother Lennox, the appellant is charged with interest at the rate of five per cent. per annum with annual rests; and the contention of the appellant is, that the account should not have been taken with annual rests.

It was, in my opinion, proper to take the account with annual rests, for the reason that the trustee was so charged in *Gilroy v. Stephens* (1882), 51 L.J. Ch. 834, namely, that it was the duty of the trustee to have invested the money which he misapplied; and, if he had done so, the investment would have produced five per cent. compound interest. It is proper to say, however, that in a subsequent case, *Owen v. Richmond*, [1895] W.N. 29, Kekewich, J., declined to follow *Gilroy v. Stephens*, because, in his opinion, "the old rule allowing interest at four per cent. ought not to be departed from." He thought "that that rule ought to be revised, having regard to the altered circumstances existing at the present day," but that it ought not to be done by a single Judge of the Chancery Division.

This old rule is, in my opinion, not applicable to circumstances in this Province in this day, and the principle applied by Fry, J., in *Gilroy v. Stephens* should, I think, be applied.

I would dismiss the appeal with costs.

Appeal dismissed.

[APPELLATE DIVISION.]

CLELAND V. BERBERICK.

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March 21

Land—Right of Land-owner—Lateral and Subjacent Support—Interference with Natural Conditions—Excavation and Removal of Sand from Adjoining Lot—Act of Neighbour Combined with Operation of Natural Laws.

The judgment of MIDDLETON, J., 34 O.L.R. 636, was affirmed by a Divisional Court.

Per MEREDITH, C.J.O., delivering the judgment of the Court:—What amounts to a wrongful interference with a land-owner's right to the lateral support of his neighbour's land must necessarily vary according to the nature of

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the soil; and, while the excavation which the defendant made upon his land could not have affected injuriously the support which his lot afforded to the plaintiff's lot, if the soil of both had been clay or any other solid substance, it did, owing to the friable and shifting nature of the sand of which the beach was formed, materially and injuriously affect it. *Corporation of Birmingham v. Allen* (1877), 6 Ch.D. 284, 289, applied. Because it was the surface soil of the plaintiff's land that was displaced, the displacement being the result of the defendant's act, combined with the operation of natural laws, the case was a stronger one for the application of the law as to lateral support than either *Jordeson v. Sutton Southcoates and Drypool Gas Co.*, [1899] 2 Ch. 217, or *Trinidad Asphalt Co. v. Ambard*, [1899] A.C. 594.

APPEAL by the defendant from the judgment of MIDDLETON, J., 34 O.L.R. 636.

March 2. The appeal was heard by MEREDITH, C.J.O., MACLAREN and MAGEE, JJ.A., and RIDDELL, J.

J. M. Ferguson, for the appellant, argued that the principle of lateral support did not apply at all. None of the land of the plaintiff immediately adjoining the defendant's land fell in. Any of the plaintiff's surface sand which was disturbed was some distance in on the plaintiff's lot, away from the boundary-line, and the disturbance was caused by the natural action of wind and waves. He referred to *Chasemore v. Richards* (1859), 7 H.L.C. 349.

F. F. Treleven, for the plaintiff, respondent, said that the plaintiff was entitled to the lateral support of his land by the defendant's land. The defendant's removal of the sand from his own lot had been the cause of the surface sand on the plaintiff's lot being carried away from it into the excavation made by the defendant in his land, and had resulted in such damage to the plaintiff's land as to entitle him to compensation. Though the carrying away of the sand from the plaintiff's lot was due, not solely to the defendant's removal of the sand from his land, but in part to the action of the winds and waters on a sandy beach, the defendant was none the less liable. He referred to *Rylands v. Fletcher* (1868), L.R. 3 H.L. 330; *Attorney-General v. Tomline* (1880), 14 Ch. D. 58; Banks' Law of Support, pp. 3, 17, 70; *Jordeson v. Sutton Southcoates and Drypool Gas Co.*, [1899] 2 Ch. 217; *Trinidad Asphalt Co. v. Ambard*, [1899] A.C. 594; *Dalton v. Angus* (1881), 6 App. Cas. 740, 791, 808.

Ferguson, in reply.

March 21. The judgment of the Court was delivered by MEREDITH, C.J.O.:—This is an appeal by the defendant from the judgment dated the 20th November, 1915, which was directed to be entered by Middleton, J., after the trial before him sitting without a jury at Hamilton on the 4th day of that month (34 O.L.R. 636).

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The parties own adjoining lots on the shore of Lake Ontario, that of the appellant lying to the south of the respondent's lot.

The respondent's complaint is, that, in consequence of the appellant having removed the sand from his own lot, the sand which formed a smooth, sloping beach on the respondent's lot, had been carried away from it and into the excavation which was made in the appellant's lot by the removal of the sand, with the result that the respondent's beach had been destroyed and his land much depreciated in value.

The learned trial Judge found that this complaint was well-founded, and determined that what the appellant had done was an actionable wrong; and he directed that judgment should be entered for the respondent for \$750, at which sum the damages were assessed.

The learned trial Judge was of opinion that what the appellant had done was an interference with the right which the respondent had to the lateral support of his lot by the appellant's land, and that it was none the less a wrongful interference with that right because the carrying away of the sand from the respondent's beach was not caused solely by the removal by the appellant of the sand from his lot, but by that act combined with the action of the wind and waves upon the sandy beach.

What amounts to a wrongful interference with a land-owner's right to the lateral support of his neighbour's land must necessarily vary according to the nature of the soil.

Dealing with the question in *Corporation of Birmingham v. Allen* (1877), 6 Ch. D. 284, 289, the Master of the Rolls (Jessel) said: "Now, what is this right of the adjoining owner? . . . It is to the support of his land in its natural state—support by whom? The Judges have said 'Support by his neighbour.' What does that mean? Who is his neighbour? It was contended that all the land-owners in England, however distant, were neighbours for this purpose if their operations in any remote degree injured

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the land. But surely that cannot be the meaning of it. The neighbouring land-owner to me for this purpose must be the owner of that portion of land, whether a wider or narrower strip of land, the existence of which in its natural state is necessary for the support of my land. As long as that land remains in its natural state, and it supports my land, I have no rights beyond it, and therefore it seems to me that he is my neighbour for this purpose. There might be land of so solid a character, consisting of solid stone, that a foot of it would be enough to support the land. There might be other land so friable and of such an unsolid character that you would want a quarter of a mile of it. But whatever it is, as long as you have got enough land on your boundary, which left untouched will support your land, you have got your neighbour's land whose support you are entitled to. Beyond that it would appear to me you have no rights." Upon appeal these views were approved.

The observation of the Master of the Rolls that "there might be other land so friable and of such an unsolid character that you would want a quarter of a mile of it," is, I think, directly applicable to soil such as that of which the beach was composed. It is manifest from the nature of it that an excavation in his neighbour's lot was likely to take away from the respondent's lot the natural support which it had from the soil of the appellant's lot; and that, while the excavation which the appellant made could not have affected injuriously the support which his lot afforded to the respondent's lot, if the soil of both had been clay or any other solid substance, it did, owing to the friable and shifting nature of the sand of which the beach was formed, materially and injuriously affect it.

I can see no difference in principle between the application of the law as to lateral support as it was applied in the cases of *Jordeson v. Sutton Southcoates and Drypool Gas Co.*, [1899] 2 Ch. 217, and *Trinidad Asphalt Co. v. Ambard*, [1899] A.C. 594, and the application of it on the facts to the case at bar.

The result of the excavation was in the *Jordeson* case that the "running silt" which underlay the plaintiff's land ran from it into the excavation, causing the surface to subside, and in the *Trinidad* case that the asphalt or pitch which formed the main ingredient of the plaintiffs' land melted and oozed forth into the defendant's land.

In both cases it was the act of the defendants, combined with the operation of natural laws, that caused the injury, and it was a substratum of the plaintiff's land that was displaced. In the case at bar it was the surface soil that was displaced, and the displacement was the result of the appellant's act, combined with the operation of natural laws—indeed the case at bar seems to be an *â fortiori* case for the application of the law as to lateral support, because it was the surface soil that was displaced.

Upon the whole, I am of opinion that the judgment is right and should be affirmed, and the appeal be dismissed with costs.

Appeal dismissed.

[APPELLATE DIVISION.]

WHALEY v. LINNENBANK.

Mechanics' Liens—Claim of Lien-holder to Priority over Mortgages upon Increased Selling Value—Claim not Made in Registered Claim of Lien—Form Prescribed by Act—Validity of Claim—Mechanics and Wage-Earners Lien Act, R.S.O. 1914, ch. 140, secs. 8 (3), 17, 23.

Where a lien under the Mechanics and Wage-Earners Lien Act, R.S.O. 1914, ch. 140, is claimed against a prior mortgagee, under sub-sec. 3 of sec. 8, it is not essential to the preservation of the lien as against the mortgagee that the claim shall be made in the registered claim of lien.

Where a claimant, within the proper time, registers a claim of lien, in the form prescribed by the Act and containing everything which sec. 17 requires to be set out in the claim, and in due time brings his action to realise his claim, the registration is effectual to preserve his lien against the prior mortgagee or mortgagees, notwithstanding that they are not named in the registered claim; and sec. 23 cannot be invoked against the claimant.

Judgment of an Official Referee reversed.

The Referee, although he dismissed the claimant's action to enforce his lien, found, on conflicting evidence, that the selling value of the land had been increased by the work done and materials supplied by the claimant; and the Court affirmed that finding, and adjudged that the claimant's lien attached upon the increased selling value in priority to the mortgages.

AN appeal by the plaintiff from the judgment of NEVILLE, Official Referee, in an action to enforce a mechanic's lien.

The reasons for the judgment of the learned Referee, in which the facts are stated, were given as follows:—

November 16, 1915. NEVILLE, Official Referee:—The plaintiff is a carpenter and builder, and was employed by the defendant Linnenbank to alter and improve buildings on the

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land in question, which was and is owned by Linnenbank, subject to two prior mortgages to the defendants Martin and Bowman.

The case comes within sub-sec. 1 of sec. 22 of the Mechanics and Wage-Earners Lien Act, and the time for filing the lien was limited to 30 days after the performance of the work. The action is an ordinary one for enforcing a mechanic's lien under that Act, with a claim for priority upon the increased selling value as against the prior mortgagees.

The last work was done on the 13th May, 1915; the claim was registered on the 9th June, 1915; and the statement of claim was filed with the Clerk of Records and Writs on the 9th August, 1915.

When the trial was concluded, I held that the plaintiff's claim of lien was valid, and disposed of all questions arising at the trial except the question of priority over the mortgages upon the increased selling value by reason of the work and materials done and furnished by the plaintiff. As to this I found that there was an increase of selling value to the extent of \$500.

Judgment was reserved only for the purpose of considering the objection raised by counsel for the mortgagees that no claim against them or for priority over their mortgages was made till after the 30 days allowed by the Act for filing the lien. The claim of lien filed in the registry office, "claims a lien upon the estate of Charles W. Linnenbank, of the city of Toronto, in the county of York, on the undermentioned lands" etc. Nothing is said of the mortgages, and mortgagees are not mentioned. The claim against them was first made when the statement of claim was filed, which was after the 30 days limited for filing the lien, but within the 90 days limited by sec. 24 of the Act for bringing the action and filing a *lis pendens*.

I have come to the conclusion that the mortgagees' objection must prevail. It is true that the Act says nothing about a time-limit for determining questions of priority between lien-holders and prior incumbrancers. One might logically conclude that it would be permissible for a claimant to establish his lien first, and to claim priority afterwards. If he should fail in his claim of lien, that would end the matter. If he should succeed, he could then make his claim to priority as against the mortgagees. This reasoning applies equally to the 90 days limited by sec. 24 and to

the 30 days limited for registering under sec. 22, or commencing action to prevent the lien being lost under sec. 23. It will be noted that, by sub-sec. 1 of sec. 8, the lien attaches upon the estate or interest of the owner. No lien is given upon the mortgagee's interest; but, by sub-sec. 3 of sec. 8, the lien is to have priority upon the increased selling value, if any.

Section 17 states what a registered claim of lien shall set out, and forms are provided in the appendix. There is no reference here to mortgagees or their interests, and I imagine that the section was not intended to apply to a claim of priority over mortgagees. Such a claim is apart from the claim of lien for which the section provides a form.

Section 19 (1) provides that a substantial compliance with sec. 17 shall be sufficient, and a lien shall not be invalidated by failure to comply with the requisites of that section, unless, in the opinion of the Court, Judge, or officer who tries the action, "the owner, contractor or sub-contractor, mortgagee, or other person, is prejudiced thereby, and then only to the extent to which he is thereby prejudiced."

But it was never intended by this section that a fundamental part of the claim should be omitted, and in the case in hand the claim against the prior mortgagees to priority upon the increased value cannot be considered unsubstantial. So far as they are concerned, it is the whole claim. The section becomes irrelevant as to them when no claim is made against them. Subsequent mortgagees are in a different position, but they are not made parties till the case comes into the Master's office, though they are given notice of trial and are entitled to be present at the hearing.

As I interpret the Act:—

1. A claimant may begin an action and file a *lis pendens* within the time limited by sec. 22 (see sec. 23); and, if he claims priority upon the increased value over a prior mortgage, the prior mortgagee must be made a defendant and the claim against him set up. See *Bank of Montreal v. Haffner* (1884), 10 A.R. 592. There Mr. Justice Osler remarked, at p. 598, that the plaintiff is at liberty to confine his action to the owner, and to take a decree for sale of the owner's interest, subject to the mortgage. But, if he wishes to any extent to displace the priority of the

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mortgagee, he must make both owner and mortgagee parties; and on p. 599: "I think the plain intention of the Act is, that proceedings shall be taken within the limited time against every one who can be affected by the lien." The other learned Judges concurred, giving reasons also.

2. A claimant may register under sec. 22. In that case, the lien shall absolutely cease, according to the terms of sec. 24, at the expiration of the time-limits therein mentioned (which would be 90 days in the case in hand), unless in the meantime an action is commenced to realise the claim and a *lis pendens* registered. To realise what claim? I should say the one made in the registered document; and, if in that there is only a claim against the owner of the equity of redemption,² that is all that can be realised in the action begun after the 30 days have expired.

The case I cited above was to enforce a registered lien, but it shews that an action is not properly constituted to displace a mortgagee's priority unless he is made a defendant. If then an action is brought to enforce an unregistered lien, the mortgagee's position must be attacked (if at all) within the time-limit set by sec. 22, which (in cases like the one in hand) is 30 days. It follows that it must be attacked within 30 days if a claim of lien is registered, unless he is to be let out in 30 days in one case, and held for 90 days in the other. The "owner" is not so treated. His interest must be attacked by registration or action within the same time-limit in all cases.

I believe in interpreting the Act liberally in the interest of a lien-holder; but it is no hardship to ask him when he registers his claim—any more than it is a hardship to ask him when he begins his action—to say whether he claims priority over a prior mortgage. He has notice of the mortgage when he registers, and requires only to insert a few additional words in his claim. And I think a mortgagee is as fairly entitled to know, within the time-limit named in the statute, whether his security is attacked, as the "owner" is to know, within that time-limit, whether his equity of redemption is incumbered or clouded by a claim of lien. The mortgagee may wish to deal with his security, and it should not be kept under a cloud any longer than is fairly necessary. He is no party to the building operations, is often ignorant of what is done, and his dealings even with the mortgagor might be affected by the lien-holder's claim.

I conclude that the plaintiff in this case was required to exercise his option to go against the equity of redemption only, or to claim against it and the mortgage security also, within the period of 30 days, and that, when he registered his claim against the equity only, and took no step and made no claim within the 30 days against the mortgagees, he must abide by his election and let the mortgagees go free.

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March 3. The appeal was heard by MEREDITH, C.J.O., MACLAREN and MAGEE, JJ.A., and RIDDELL, J.

J. Y. Murdoch, for the appellant, argued that neither sec. 17 of the Mechanics and Wage-Earners Lien Act, nor the form of claim attached to it, required that the mortgagees should be named in the claim of lien. Though not so named, they could be made defendants in the action.

V. H. Hattin, for the defendants Martin and Bowman, respondents, contended that the learned Referee's judgment was right, for the reasons given by him. Section 23 of the Act requires that the action must be to realise the "claim," and the claim registered here did not mention the mortgagees. He referred to *Bank of Montreal v. Haffner*, 10 A.R. 592, at p. 598. The finding that the selling value of the land has been increased by the work done and materials furnished, is wrong on the evidence. Reference to *National Trust Co. v. Battell* (1916), 33 W.L.R. 738.

J. F. Boland, for the defendant Linnenbank, respondent.

Murdoch, in reply, referred to *Kennedy v. Haddow* (1890), 19 O.R. 240, on the question of increased value.

March 21. The judgment of the Court was delivered by MEREDITH, C.J.O.:—This is an appeal by the plaintiff from the judgment dated the 16th November, 1915, which was pronounced by an Official Referee (Neville) after the trial of the action before him.

The action is brought under the Mechanics and Wage-Earners Lien Act to realise a lien claimed by the appellant for work done and material supplied by him in the construction of a building on the lands in question which belonged to the respondent Linnenbank, subject to a mortgage to the respondents Martin and

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Bowman, and the lien is claimed as against the mortgagees only upon the increased selling value of the land by reason of the work done and material supplied by the appellant, which the Referee found to be \$500.

Notwithstanding this finding, the action was dismissed on the ground that the appellant's lien ceased to exist at the expiration of thirty days from the completion of the work and the furnishing or placing of the last material furnished or placed by the appellant, although he had within that period registered a claim for the lien in the form prescribed by the Act and containing everything which sec. 17 of the Act requires to be set out in the claim, and had brought this action to realise his claim in due time. The view of the Referee was that where a lien is claimed against a prior mortgagee under sub-sec. 3 of sec. 8, it is essential that it must be so stated in the registered claim in order to preserve the lien as against the mortgagee.

We are of opinion that the ruling of the Referee was erroneous and that the registration of the claim of the appellant was effectual to preserve his lien as against the respondents Martin and Bowman.

As I have said, the claim set forth everything which sec. 17 requires to be set forth, and was in the form prescribed by the Act. The appellant had therefore complied with everything which the Act requires to be done by him in order to preserve his lien. Section 23 provides that "every lien for which a claim is not registered shall absolutely cease to exist on the expiration of the time hereinbefore limited for the registration thereof unless . . ."

The lien having been registered, as it was, in strict compliance with the provisions of the Act, sec. 23 cannot be invoked against the appellant.

The judgment of the Referee must therefore be reversed, unless, as the respondents contend, the finding that the selling value of the land has been increased by the work done and the materials supplied by the appellant cannot be supported.

An inquiry of that nature, the result depending, as it always must, upon opinion evidence, is always a difficult one, and was especially so in this case owing to the character of the building that has been erected. There was a conflict of evidence, some of the witnesses being of opinion that not only had the selling

value of the property not been increased by the erection of the building, but that it had been lessened. On the other hand, there was evidence that the selling value had been increased by more than \$500. The Referee, who saw and heard the witnesses, was in a better position to judge as to the weight which should be attached to their evidence than we are, and I am unable to say that the conclusion to which he came was wrong.

The result is that, in my opinion, the appeal should be allowed with costs, and the judgment of the Referee as to the matters in question on the appeal be reversed, and that there should be substituted for it a declaration that the selling value of the land in question was increased by the work done and materials supplied by the appellant, by the sum of \$500, and an adjudication and order that the appellant's lien attaches upon such increased selling value in priority to the mortgages of the respondents.

Appeal allowed.

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Landlord and Tenant—Entry by Landlord—Eviction of Tenant—Justification under Forfeiture Clause in Lease— Chattel Mortgage Made by Tenant— Landlord and Tenant Act, R.S.O. 1914, ch. 155, sec. 20 (2)—Application of—Failure to Give Notice—Nominal Damages—Costs.

The notice required by sec. 20 (2) of the Landlord and Tenant Act, R.S.O. 1914, ch. 155, is necessary as a preliminary to re-entry without action—its application is not confined to cases where the landlord is suing for the recovery of the premises.

In re Riggs, Ex p. Lovell, [1901] 2 K.B. 16, approved and followed.

In this case, the making by the tenant of a chattel mortgage was a breach of a provision in the lease which gave the landlord the right to re-enter and put an end to the lease; but the landlord was not entitled to enforce that right because he had not complied with the requirement of sec. 20 (2) as to notice. In entering, therefore, the landlord was a wrongdoer; but it did not follow that the tenant was entitled to recover such damages as he would have been entitled to if there had been no breach of the condition and no right in the landlord to evict him.

In the tenant's action for wrongful entry and wrongful ejection, he was held entitled to judgment, with nominal damages (\$5) only, and costs on the appropriate scale.

Judgment of the County Court of the County of York reversed.

APPEAL by the plaintiff from the judgment of COATSWORTH, Junior Judge of the County Court of the County of York, dismissing an action, brought in that Court and tried by him without

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a jury, to recover damages for the wrongful entry of the defendant upon a farm demised by the defendant to the plaintiff and the wrongful ejection of the plaintiff therefrom.

February 21. The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, JJ.A.

J. M. Ferguson, for the appellant, argued that his position was supported by sec. 20 of the Landlord and Tenant Act. The evidence did not support the defences of voluntary abandonment and surrender of the premises. He referred to *Walters v. Wylie* (1912), 3 O.W.N. 567.

Frank Arnoldi, K.C., for the respondent, argued that upon the true construction of the Act the defendant had a right to re-enter upon the demised premises. In any case, the appellant was entitled to nothing more than nominal damages. The evidence shewed that the plaintiff had voluntarily given up possession. He referred to Woodfall's Landlord and Tenant, 19th ed., p. 59.

Ferguson, in reply, referred to *Lock v. Pearce*, [1892] 2 Ch. 328.

March 21. The judgment of the Court was delivered by MEREDITH, C.J.O.:—This is an appeal by the plaintiff from the judgment of the County Court of the County of York, dated the 15th November, 1915, which was directed to be entered by a Junior Judge of that Court (Coatsworth) after the trial of the action before him, sitting without a jury, on the 9th day of that month.

The appellant was tenant of the respondent of a farm in the township of Georgina, held under a lease from him dated the 28th September, 1908. The term of the lease is seven years from the 15th March, 1909, and the rent is \$125 for the first year, \$150 for the second year, and \$175 for each of the remaining five years of the term.

The lease contains a provision that: "If the term hereby granted or any of the goods or chattels of the said lessee shall be at any time during said term seized or taken in execution or attachment by any creditor of the said lessee, or if the said lessee shall make any chattel mortgage or bill of sale of any of his crops or other goods and chattels, or any assignment for the benefit of creditors, or, becoming bankrupt or insolvent, shall take the benefit of any

Act that may be in force for bankrupt and insolvent debtors, or shall attempt to abandon said premises or to sell and dispose of his farm stock and implements so that there would not in the event of such sale or disposal be a sufficient distress on said premises for the then accruing rent, of which the said lessor shall be the sole judge, then in every such case the then current and next ensuing year's rent and the taxes for the then current year (to be reckoned upon the rate of the previous year in case the rate shall not have been fixed for the then current year) shall immediately become due and payable, and the term hereby granted shall at the option of the said lessor immediately become forfeited, void and determined, and in every of the above cases such taxes or accrued portion thereof be recoverable by said lessor in the same manner as the rent hereby reserved; and also in case of removal by the lessee of his goods and chattels in whole or a substantial part thereof from off the said premises, the said lessor may follow and distrain the same for thirty days in the same manner as is provided for by law in cases of fraudulent or clandestine removal."

The action is brought to recover damages for the wrongful entry by the respondent upon the demised premises and the wrongful ejection by him of the appellant from them.

By his statement of defence the respondent, besides putting in issue the fact of the alleged eviction, justifies his entering into possession of the premises because: (1) the appellant had made a mortgage of his chattels; (2) had removed his chattels from the demised premises in the month of April, 1914; and (3), in the judgment of the respondent, the appellant, in April, 1914, abandoned the demised premises, and did not leave on them a sufficient distress for the rent then accruing; and alleges that, therefore, by virtue of the provisions of the lease which I have quoted, the term granted by it became immediately forfeited and void, and the respondent "became entitled to enter into possession of the demised premises, as he did."

The respondent also claims that, by reason of the acts alleged to have been committed by the appellant, the then current and the next year's rent and the taxes for the current year became immediately due and payable, and by counterclaim he claims judgment for \$350 "rent forfeited by the defendant by counterclaim by his acts, and for taxes."

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Besides the defence justifying his entry, the respondent at the trial endeavoured to establish that the appellant had voluntarily left the premises and had surrendered his lease and the term granted by it. The learned Judge makes no finding as to these matters; but, in my opinion, the proper conclusion upon the evidence is that neither of these defences was made out.

The learned Judge, however, dismissed the action, holding that, "taking into consideration all the circumstances, the notice by the plaintiff to the defendant, the chattel mortgage, the leaving and apparent abandonment of the premises by the plaintiff, and the removal of his goods therefrom, so that, in the judgment of the lessor, there was not sufficient distress," the respondent "was quite justified in taking possession of the premises, and he was entitled to do so."

The appellant relied upon the provisions of sec. 20 of the Landlord and Tenant Act, R.S.O. 1914, ch. 155, but the view of the learned Judge was, that that section applies only where the landlord is suing for the recovery of the premises.

Sub-section 2 of sec. 20 provides that "a right of re-entry or forfeiture under any proviso or stipulation in a lease, for a breach of any covenant or condition in the lease other than a proviso in respect of the payment of rent, shall not be enforceable, by action or otherwise, unless and until the lessor serves on the lessee a notice specifying the particular breach complained of, and if the breach is capable of remedy, requiring the lessee to remedy the breach, and, in any case, requiring the lessee to make compensation in money for the breach, and the lessee fails, within a reasonable time thereafter, to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money to the satisfaction of the lessor for the breach."

I am unable to agree with the conclusion of the learned Judge that sub-sec. 2 applies only where the landlord is suing for the recovery of the premises. It was held otherwise under the corresponding section of the Imperial Act (44 & 45 Vict. ch. 41), by Wright, J., in *In re Riggs, Ex p. Lovell*, [1901] 2 K.B. 16. The view of that learned Judge was that the notice which the Act requires is necessary as a preliminary to re-entry without action; and, referring to the words "or otherwise," he said (p. 20) that "no mode of enforcing such a right otherwise than by action has

been suggested except that of peaceable entry." He also thought that the use of the words "if any" in sub-sec. 2 (i.e., of the Imperial Act)—"the lessee may in the lessor's action, if any"—indicates that entry without action was within the purview of sub-sec. 1.

Although in this Province there is a mode, other than an action, by which a right of entry or forfeiture may be enforced, namely, under the overhoiding provisions of the Landlord and Tenant Act, and to that extent one of the reasons assigned for the conclusion of the learned Judge may be somewhat weakened, we should, I think, adopt his construction of the Act, especially as in the leading text-books on the law of landlord and tenant his view is adopted: Woodfall's Landlord and Tenant, 19th ed., p. 384, note (a); Halsbury's Laws of England, vol. 18, p. 539, note (n); Foa's Landlord and Tenant, 5th ed., p. 741, note (a).

The giving of the chattel mortgage was, no doubt, a breach of the provisions of the lease which I have quoted, which gave to the respondent a right of re-entry and to put an end to the lease; and, but for the provisions of sec. 20 of the Landlord and Tenant Act, that would be sufficient to entitle him to succeed. That right is, however, qualified by sec. 20, and the respondent was not entitled to enforce it unless or until he had complied with the requirement of the section as to notice, and that he had not done. In entering he was, therefore, in my opinion, a wrongdoer, but it does not follow that the appellant is entitled to more than nominal damages. He had committed a breach of the condition, and the right of the respondent to re-enter, though the putting of it into force is suspended, still exists, and it is only in the event of the appellant being able to obtain relief from the forfeiture that the right of re-entry will be gone. He has taken no steps to obtain that relief, and it is by no means clear that, if it had been applied for, it would have been obtained. It would therefore be manifestly unfair that he should recover damages based upon his having been deprived of the use of the premises and of the benefit of the ploughing that had been done in the fall before his eviction—in other words, the damages to which he would have been entitled if there had been no breach of the condition and no right in the landlord to evict him.

It is difficult to find any satisfactory basis upon which the

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damages are to be assessed at more than a nominal sum. If the measure of them is the loss the appellant has sustained by having lost the chance of succeeding in an application to be relieved from the forfeiture, I am unable to see how that loss can be satisfactorily measured, having regard to the fact that the giving of the notice which the statute required the respondent to give before entering was not a condition precedent to the right of the respondent himself to apply for relief, which, under sub-sec. 3 of sec. 20, he may do; and, upon the whole, I am of opinion that only nominal damages should be awarded.

I would, for these reasons, allow the appeal with costs and substitute for the judgment dismissing the action judgment for the appellant for \$5, with costs on the appropriate scale.

Appeal allowed.

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[APPELLATE DIVISION.]

REX v. FARRELL.

Criminal Law—Carnal Intercourse with Young Girl—Criminal Code, secs. 210, 211, 1002 (c)—Two Offences—Acquittal on First—Corroboration by Evidence of Second Offence—Proof of Previous Unchastity of Prosecutrix—Evidence as to First Offence—Evidence relating to other Occasions.

There were two charges against the defendant: the first, of having had illicit connection with the prosecutrix, a girl of previously chaste character, between fourteen and sixteen years of age, on the 15th December, 1914; the second, of having had illicit connection with the same girl, described as before, in or about the month of May, 1915. The defendant was acquitted on the first count, and found guilty upon the second:—

Held, upon a stated case, that the trial Judge was right as a matter of law in rejecting evidence of what took place in May as corroboration of the evidence of the prosecution as to what took place in December.

Held, also, that the trial Judge was not bound to find, in regard to the second charge, that the prosecutrix was not of previously chaste character in May, merely because of her own testimony that she had in December had carnal connection with the defendant: see secs. 210, 211, and 1002 (c) of the Criminal Code.

Held, also, that a contention raised by the defendant upon a passage in the evidence (made part of the stated case), indicating that there had been other acts of carnal intercourse, should not prevail; the onus of proving previous unchastity being upon the defendant, and the passage referred to being of doubtful meaning.

THE charge against the defendant was, that he, on or about the 15th December, 1914, at the city of Kingston, in the county of Frontenac, did have illicit connection with one Florence Gibb,

a girl of previously chaste character, of or above the age of fourteen years and under the age of sixteen years, and further that, at the said city, in or about the month of May, 1915, he did have illicit connection with the said Florence Gibb described as before.

The defendant, on the 29th November, 1915, came for trial before the Judge of the County Court of the County of Fronténac, in the County Court Judge's Criminal Court, without a jury, upon his election and consent to be so tried, upon the above charge, and pleaded "not guilty."

The defendant was found guilty upon the second count, but acquitted on the first count; and the learned County Court Judge stated a case for the opinion of the Court of Appeal. The stated case, after setting out the accusation as above, was as follows:—

"At the trial, the Crown offered, in corroboration of the evidence of the said Florence Gibb that the prisoner had illicit connection with her on or about the 15th December, 1914, as charged in the first count, evidence that in May, 1915, the prisoner had gone to the bed-room of the said Florence Gibb, where she was in bed with another young girl called Nellie Radwell, and had got into bed with them and stayed from about 1 a.m. until 5 a.m., the said Florence Gibb swearing that during that time he had carnal connection with her, and the said Nellie Radwell swearing that she turned her back and did not know what occurred, but felt the bed shaking.

"I held that this evidence of what occurred in May was not admissible, and acquitted the prisoner on the ground that there was no corroborative evidence as required by section 1002 of the Criminal Code.

"At the request of the Crown, I reserved for the opinion of the Court of Appeal the question as to whether I was right as a matter of law in rejecting the above as corroborative evidence.

"On the second count, I found the prisoner 'guilty' on the evidence of Florence Gibb, corroborated, as I held, by the evidence of Nellie Radwell as to what she swore occurred on the night in question, and strengthened, as I believed, by the admissions of the prisoner when sworn on his own behalf.

"I held that the evidence did not establish, as required by section 210 of the Criminal Code, that Florence Gibb was in May of previously unchaste character.

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"The defence contended that Florence Gibb, having sworn to having had carnal connection with the prisoner in December, 1914, established conclusively that she was not of previously chaste character in May, 1915.

"I thought, as she was under the influence of liquor on the night in December, she might be mistaken as to what occurred; and, if not, that, being under the influence of liquor, and this being the only previous act of carnal connection alleged, I was not bound to accept it as necessarily proving previously unchaste character.

"At the request of the defence, I reserved for the opinion of the Court of Appeal the question whether I was at liberty to hold that Florence Gibb was not proved to be a girl of previously unchaste character in May, notwithstanding her evidence that she had previously in December had carnal connection with the prisoner.

"Annexed is a copy of my notes of evidence, taken at the trial."

The following sections of the Criminal Code, R.S.C. 1906, ch. 146, may be referred to:—

210. The burden of proof of previous unchastity on the part of the girl or woman under the three next succeeding sections shall be upon the accused.

211. Every one is guilty of an indictable offence and liable to two years' imprisonment who seduces or has illicit connection with any girl of previously chaste character, of or above the age of fourteen years and under the age of sixteen years.

1002. No person accused of any offence under any of the hereunder mentioned sections shall be convicted upon the evidence of one witness, unless such witness is corroborated in some material particular by evidence implicating the accused:—

* * * *

(c) Offences under Part V., sections 211 to 220 inclusive.

March 20. The case was heard by MEREDITH, C.J.O., GARROW, MACLAREN, MAGEE, and HODGINS, JJ.A.

T. J. Rigney, for the prisoner, argued that, as to the second charge, the prosecutrix had proved her previous unchastity by

admitting the act of sexual intercourse on the 15th December, 1914: *Rex v. Hughes* (1910), 22 O.L.R. 344. The evidence also shewed that there were other occasions between December and May.

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Edward Bayly, K.C., for the Attorney-General for Ontario, after stating that he would not press the contention of the Crown at the trial as to corroboration, contended that on the second question the learned trial Judge was not bound to accept the girl's evidence of what occurred on the 15th December. He might disbelieve her, or consider that she had been mistaken. At all events, the prisoner could not take advantage of evidence of an event which he himself had denied, to free himself of the second charge.

March 23. The judgment of the Court was delivered by MEREDITH, C.J.O.:—Case stated by the Judge of the County Court of the County of Frontenac.

The prisoner was tried at the County Judge's Criminal Court of the County of Frontenac on two charges for offences under sec. 211 of the Criminal Code; the first of which was alleged to have been committed on the 15th December, 1914, and the second in or about the month of May following.

The prosecutrix was examined as a witness, and testified that the prisoner had sexual intercourse with her on both of these dates. This was denied by the prisoner, and his evidence as to the first occasion was corroborated by other witnesses. The prisoner was acquitted on the first and convicted on the second charge.

At the trial, counsel for the Crown contended that the evidence of the prosecutrix as to the first offence charged was corroborated in a material particular by the evidence which was given of the prisoner having committed the second offence charged, but the learned Judge refused to give effect to the contention; and it was contended by counsel for the prisoner that, as the prosecutrix had testified that there had been sexual intercourse between her and the prisoner on the 15th December, 1914, the burden of proof of her previous unchastity was, in respect of the second charge, satisfied, and the prisoner should have been acquitted on that charge.

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Both of these questions are now presented for the opinion of the Court in the stated case. Upon the opening of the appeal, counsel for the Crown stated to the Court that he could not support the contention that was put forward by the counsel for the Crown at the trial as to corroboration; and, as we agree that it cannot be supported, the first question must be answered in the affirmative.

It does not necessarily follow that, because the prosecutrix testified that she had had sexual intercourse with the prisoner in the previous December, the Judge was bound to find as to the second charge that she was not of previously chaste character.

Dealing with that question, the learned Judge said: "I thought, as she was under the influence of liquor on the night in December, she might be mistaken as to what occurred; and, if not, being under the influence of liquor, and this being the only previous act of carnal connection alleged, I was not bound to accept it as necessarily proving previously unchaste character."

I agree with that view; and, in addition to what is there said, I may point out that it would be an extraordinary result if the prisoner, having secured his acquittal on the first charge on the strength of his denial that he had sexual intercourse with the prosecutrix on the 15th December, 1914, should be entitled to be acquitted as to the second charge on the ground that he had proved the unchastity of the prosecutrix because of the very act of intercourse which he testified had never taken place.

There is another point to be considered. It was argued by counsel for the prisoner that the prosecutrix on her examination at the trial testified that there had been sexual intercourse between her and the prisoner on several occasions between the 15th December, 1914, and the following May. This contention is based upon the following passage from the Judge's notes of the evidence of the prosecutrix: "Farrell had connection with me, that was the first time, after that there were other occasions."

I do not think that this contention can be raised by the prisoner, in view of the form of the question submitted in the stated case; but, if it were open, I do not think that we should treat this testimony as necessarily referring to occasions before the month of May, 1915. The learned Judge did not so undersand it. He says that "the defence contended that Florence Gibb,

having sworn to having had carnal connection with the prisoner in December, 1914, established conclusively that she was not of previously chaste character in May, 1915." And in the passage I before quoted he refers to "the night in December . . . being the only previous act of carnal connection alleged."

The passage in the evidence which is relied on by the prisoner to establish previous unchastity is, at the most, of doubtful meaning; and, the onus of proving previous unchastity being upon the prisoner, he cannot complain because the Judge did not give to the words used by the prosecutrix the meaning for which the prisoner contends, if, as I think, it was open to the Judge to treat them, as he did, as meaning what he in effect says in his statement of the case they actually meant.

The evidence was not taken down in shorthand, but mere notes of it were made by the Judge, and he should be, I think, the best interpreter of them. Moreover, the interpretation he put upon them appears to have been the same as that put upon them by the prisoner's counsel, if the statement of his contention at the trial was what the learned Judge says, and we must take it correctly says, it was.

The second question, as I understand it, is confined to the single point whether or not the testimony of the prosecutrix that the prisoner had carnal intercourse with her on the 15th December, 1914, made it incumbent on the Judge to find that she was not as respects the second charge of previously chaste character.

If the question to be determined was, whether or not upon the whole evidence the prosecutrix was proved to be not of previous chaste character, my conclusion might be different.

The second question should be answered in the affirmative.

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March 27.

REX V. BENDER.

Criminal Law—Search-warrant—Canada Temperance Act, R.S.C. 1906, ch. 152, sec. 136—Information—Failure to Disclose Facts Shewing Causes of Suspicion—Order Quashing Warrant—Condition as to Bringing Action.

An information sworn to by an Inspector under the Canada Temperance Act, R.S.C. 1906, ch. 152, stated merely that the informant "hath just and reasonable cause to suspect and doth suspect that intoxicating liquor is kept for sale," in violation of the Act, by the defendant. Upon this a search-warrant was issued by a Police Magistrate, under sec. 136 of the Act:—

Held, that, as the information did not disclose facts and circumstances shewing the causes of suspicion, the warrant issued thereupon must be deemed to have been improperly issued, and must be quashed; the order quashing to contain a condition to the effect that no action should be brought against the Police Magistrate or against any officer acting on the search-warrant to enforce the same.

Review of the authorities.

Rex v. Kehr (1906), 11 O.L.R. 517, followed.

MOTION by the defendant to quash an information taken and a search-warrant issued by a Police Magistrate, in the circumstances stated below. The information was sworn to by an Inspector under the Canada Temperance Act, R.S.C. 1906, ch. 152.*

March 7. The motion was heard by SUTHERLAND, J., in Chambers.

L. E. Dancey, for the defendant.

J. R. Cartwright, K.C., for the Attorney-General.

March 27. SUTHERLAND, J.:—A motion to quash an information and search-warrant, upon the grounds following:—

(1) That the information upon which the search-warrant was

*Section 136 of the Act provides as follows: "If it is proved upon oath before any judge of the sessions of the peace, recorder, police magistrate, stipendiary magistrate, sitting magistrate, two justices of the peace, or any magistrate having the power or authority of two or more justices of the peace, that there is reasonable cause to suspect that any intoxicating liquor is kept for sale in violation of Part II. of this Act, or of the Temperance Act of 1864, in any dwelling-house, store, ship, warehouse, outhouse, garden, yard, croft, vessel, or other place or places, such officer may grant a warrant to search in the day time such dwelling-house . . . or other place or places for such intoxicating liquor, and if the same or any part thereof is there found, to bring the same before him.

"2. Any information to obtain a warrant under this section may be in form Q, and any search-warrant under this section may be in form R."

issued herein was not sufficient to give the Police Magistrate jurisdiction to issue it, because it did not disclose the facts and circumstances which went to shew the just and reasonable cause the informant had to suspect that liquor, in respect of which an offence was committed, was on the defendant's premises; and the said Police Magistrate, in the taking of the said information and the issuing of the said search-warrant, acted entirely without jurisdiction.

(2) That the search-warrant issued on the said information was illegally and improperly obtained for the sole and only purpose of securing evidence against the defendant upon which afterwards to found a charge for a breach of the provisions of the Canada Temperance Act and amendments thereto.

(3) That the taking of an information for the issue of a search-warrant is a judicial act, and evidence should have been adduced before the said Police Magistrate for the purpose of enabling him to judge of the sufficiency of the causes of suspicion to justify him in issuing the said warrant herein, which was not done.

The information was laid by John Torrance, an Inspector in the county of Huron, before S. J. Andrews, the Police Magistrate at the town of Clinton, in the said county, and the information sworn to by Torrance states that he "hath just and reasonable cause to suspect and doth suspect that intoxicating liquor is kept for sale, in violation," etc.

The search-warrant thereupon issued recites that: "Whereas John Torrance, Inspector, of Clinton, in the said county of Huron, hath this day made oath before me, the undersigned S. J. Andrews, Police Magistrate, one of His Majesty's Justices of the Peace in and for the said township of Hay, that he hath just and reasonable cause to suspect and doth suspect that intoxicating liquor is kept for sale," etc.

In *Regina v. Doyle* (1886), 12 O.R. 341, it was held that a search-warrant under the Canada Temperance Act, 1878, was a proceeding to sustain a charge made for an offence committed against the Act, and not a proceeding taken upon which to found a charge to be made in case liquor were found on the premises; and in *Regina v. Walker* (1887), 13 O.R. 83, it was held that "secs. 108 and 109 of the Act were intended to provide process *in rem* for the confiscation and destruction of liquor in respect of which a use prohibited by the statute was being made, and not to provide a

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means of obtaining evidence on which to found a prosecution or support one already begun."

In *Rex v. Kehr* (1906), 11 O.L.R. 517, it was held that "the information necessary to justify the issuing of such warrant must disclose facts and circumstances shewing the causes of suspicion, which tended to the belief of the commission of the alleged offence, with regard to which the warrant is deemed essential. The information herein being defective in this respect, the warrant was directed to be quashed." This was a decision of the Exchequer Divisional Court.

In a New Brunswick case, *Ex p. Coffon* (1905), 11 Can. Crim. Cas. 48, it was held, in connection with a charge of keeping liquor for sale contrary to the Canada Temperance Act, where the accused had been arrested and brought before the magistrate to answer the charge, the sworn information merely stating "that the complainant has just cause to suspect and believe and does suspect and believe that the defendant has committed the offence charged," and the magistrate having made no inquiry into the grounds of suspicion, that the magistrate acquired no jurisdiction to proceed with the trial; and the conviction was quashed.

In the Supreme Court of Nova Scotia, in the case of *The King v. Townsend* (No. 2) (1906), 11 Can. Crim. Cas. 115, it was held that an information for a search-warrant under the Canada Temperance Act sufficiently stated the causes of suspicion and the particulars of the offence, if it stated that the informant had just and reasonable cause to suspect and did suspect that intoxicating liquor was kept for sale in violation of the statute in a specified hotel, and the reason for such suspicion was that persons who had there purchased liquor from the hotel-keeper had told the informant that such hotel-keeper was keeping liquor for sale.

In the present case, it is urged on this motion on behalf of Bender, the suspected person, that *Rex v. Kehr* is precisely in point, and that, following it, I should determine that the information on which the search-warrant was issued was defective in that it did not disclose the facts and circumstances which went to shew the just and reasonable cause which led the informant to suspect that liquor was on the defendant's premises.

There was an appeal in the case of *The King v. Townsend* to

the Judicial Committee of the Privy Council, which appeal was dismissed: see *The King v. Townsend* (No. 4) (1907), 12 Can. Crim. Cas. 509. It had been contended in the Supreme Court of Nova Scotia that with respect to search-warrants it had been decided that a warrant could only issue "as ancillary to a prosecution already commenced." It was contended, on the other hand, that the Act had been amended by striking out the words on which the Courts had founded their opinion that the commencement of the prosecution was a condition precedent to the issue of a search-warrant. The decision of the Privy Council dealt only with this latter question on the appeal, Lord Collins saying, as reported at p. 520 of 12 Can. Crim. Cas.: "Their Lordships cannot doubt that the Legislature by this simple and artistic amendment intended to make it impossible to ground a similar contention on the amended sections. Without, therefore, inquiring further into the reasons which have been urged against the granting of special leave in these cases, their Lordships are content to rest their decision upon the authority above cited."

By reference to the case in the Supreme Court of Nova Scotia, it appears that Sir Robert L. Weatherbe, C.J., in a dissenting judgment, considered that no particulars of the offence required by the informant had been given in the information laid in that case. Graham, E.J. (11 Can. Crim. Cas. at p. 143), was of opinion that the causes of suspicion were quite sufficiently set out in the information and it set forth enough to give the magistrate jurisdiction; and Russell, J., at p. 146, said that the information complied "with the additional requirements contained in the italicised parenthesis in the form, by stating the causes of suspicion, and also setting out, though in another part of the form, the particulars of the offence." And Longley, J., at p. 150, says: "The reasons or particulars of this case are not very strong, but relating as they do to the offence charged, it seems to me they are about as explicit as could reasonably be demanded."

Torrance, the Inspector, made an affidavit filed in these proceedings and was cross-examined thereon, and it appears that certain information had been communicated to him, which, if set out in the information sworn to by him, might have been held to be, to some extent at least, a setting out of the "causes of suspicion." The magistrate was also examined, and said upon his

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examination that certain letters were shewn to him by the Inspector, and certain information communicated, which he could not very well recall or swear to, but which was of such a kind that he was satisfied there was just ground for issuing the warrant. Even if this somewhat hazy statement on the part of the magistrate could now properly be considered by me on this motion, it would not, I think, assist very much.

It seems to me that I am bound by and should follow *Rex v. Kehr*, and hold that, as the information did not disclose "facts and circumstances shewing the causes of suspicion," the warrant issued thereupon must be deemed to have been improperly issued, and must be quashed.

The order quashing will contain a condition similar to that in *Rex v. Kehr*, to the effect that no action shall be brought against the Police Magistrate or against any officer acting on the search-warrant to enforce the same.

[See *Rex v. Swarts* (1916), 10 O.W.N. 231, and *Rex v. Bedford* (1916), *ib* 233. These cases will be reported in the Ontario Law Reports.]

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[IN CHAMBERS.]

March 30.

RE GEORGE AND LANG.

Mortgage—Order of Judge under Mortgagors and Purchasers Relief Act, 1915—Right of Appeal—"Absolute Discretion"—Secs. 2 and 5 of Act—Rule 507.

No appeal lies from the order of a Judge, under secs. 2 and 5 of the Mortgagors and Purchasers Relief Act, 1915, granting or refusing leave to proceed for the recovery of principal money upon a mortgage.

The statute makes the leave of a Judge a condition precedent to the bringing of an action; and upon the application for leave the Judge is given certain powers to be exercised "in his absolute discretion" and "subject to such conditions as he thinks fit:" sec. 5 (1).

In the absence of any provision in the Act itself giving the right of appeal, the provisions of Rule 507 should not be imported, simply because "the application shall be upon originating notice:" sec. 2 (2).

Even if there were a right of appeal, the appellate Court would probably not review the "absolute discretion" exercised by the Judge; and, if Rule 507 were applicable, there did not appear to be anything in the present case to bring it within the provisions of that Rule.

APPLICATION by John K. George, mortgagee, under Rule 507, for leave to appeal to a Divisional Court of the Appellate Division from an order of MULLOCK, C.J.Ex., in Chambers, dated the 28th March, 1915, dismissing a motion by the applicant, under the

Mortgagors and Purchasers Relief Act, 1915, for leave to bring an action upon a mortgage made before the 4th August, 1914, by Herman H. Lang, John C. Stevenson, and William Meen, to the applicant, for \$3,000 principal money past due upon the mortgage and a larger sum due by acceleration.

The application was made after judgment had been given in *George v. Lang*, ante 180, the mortgage being the same one that was sought to be enforced in that action.

March 28. The application was heard by MIDDLETON, J., in Chambers.

Frank Arnoldi, K.C., for the applicant.

R. H. Parmenter, for the mortgagors, the respondents.

March 30. MIDDLETON, J.:—Motion for leave to appeal from an order of the Chief Justice of the Exchequer dismissing a motion under the Moratorium Act* for leave to proceed for some \$3,000 principal money past due upon a mortgage and a larger sum due by acceleration.

The motion is, by the Act, to be upon originating notice and returnable in Chambers; and, as it does not finally dispose of the matter, there cannot be an appeal save by leave.

But I am of opinion that the statute does not contemplate any appeal, and my view has been confirmed by several of my brethren to whom I have spoken.

The statute makes the leave of a Judge a condition precedent

*The Mortgagors and Purchasers Relief Act, 1915, 5 Geo. V. ch. 22 (O.) Section 2 provides: "(1) No person shall,—(a) take or continue proceedings by way of foreclosure or sale or otherwise, or proceed to execution on or otherwise to the enforcement of any judgment or order of any Court . . . for the recovery of principal money secured by any mortgage of land or any interest therein made or executed prior to the 4th day of August, 1914 . . . except by leave of a Judge upon application as hereinafter provided."

"(2) The application shall be upon originating notice in accordance with the practice of the Supreme Court"

Section 5 provides: "(1) On any application the Judge may grant the leave applied for, or if he is of opinion that time should be given to the person liable to make any payment on the ground that he is unable immediately to make the same by reason of circumstances attributable directly or indirectly to the present war, the Judge may, in his absolute discretion, after considering all the circumstances of the case and the position of all parties, by order refuse to permit the exercise of any right or remedy, or may stay execution . . . for such time and subject to such conditions as he thinks fit."

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to the bringing of an action: upon the application for leave the Judge is given certain powers to be exercised "in his absolute discretion" and "subject to such conditions as he thinks fit."

The scheme of the Act is to intrust to the Judge, in this time of financial stress, the right to interfere with the contractual rights of the parties and to give to him an "absolute discretion" in so doing; and, in the absence of any provision in the Act itself giving the right of appeal, I think I should not be warranted in importing the provisions of Rule 507,* simply because the motion is authorised to be made on an "originating notice." The relief intended to be given to unfortunate mortgagors would be illusory indeed if the only effect was a preliminary hearing subject to the expense of an appeal to the Appellate Division.

Even if there is the right of appeal, the appellate Court would not be likely to interfere—an "absolute discretion" cannot be reviewed merely by the suggestion that the appellate Court would not have made the same order. This has been well established by many cases under enactments relating to costs, where a discretion is given to a Judge or taxing officer. There is no warrant for substituting, for the good judgment and discretion of the Judge or officer applied to, the good judgment and discretion of the appellate Court.

If Rule 507 does apply, there does not appear to be anything in the case to bring it within the provisions of that Rule.

In the exercise of my "absolute discretion," I give no costs of this motion.

*"507. (1) A person affected by an order or judgment pronounced by a Judge in Chambers which finally disposes of the whole or part of the action or matter may appeal therefrom to a Divisional Court without leave.

"(2) Except in cases in which a right of appeal is specially conferred no appeal shall lie from any judgment or order of a Judge in Chambers which does not finally dispose of the whole or part of the action or matter, unless by leave of a Judge other than the Judge by whom the judgment or order was pronounced.

"(3) Such leave shall not be given unless:—

"(a) There are conflicting decisions . . .

"(b) There appears to be good reason to doubt the correctness of the judgment or order . . . and the appeal would involve matters of such importance that in the opinion of the Judge leave to appeal should be given."

[IN CHAMBERS.]

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March 31.

RE REX EX REL. STEPHENSON V. HUNT.

Municipal Elections—Alderman—Disqualification — Chief Officer of Association Having Contractual Relations with City Corporation—Application for Fiat—Time—Municipal Act, R.S.O. 1914, ch. 192, sec. 162 (1)—Facts Known to Relator at Time of Election—Ground of Application—Additional Evidentiary Facts Becoming Known after Election.

Under sec. 162(1) of the Municipal Act, R.S.O. 1914, ch. 192, a relator must make his application for a *fiat* to commence proceedings to unseat a member of a municipal council, within six weeks after an election, or one month after the acceptance of office, unless the facts upon which he relies did not come to his knowledge until after the election, when he has six weeks after the facts came to his knowledge:—

Held, that the “facts” are the “ground,” and, if the “facts” which form the real ground for the application are known at the time of the election, the time will not be extended simply because the relator afterwards becomes aware of facts which are mere evidence, additional evidence, in support of the “facts” forming the “ground,” known at the time of the election.

The ground of the application in this case was, that the respondent was disqualified, by reason of his being secretary and chief officer of the Western Fair Association, which had contractual relations with the Corporation of the City of London, from sitting as an alderman of the city. The disqualification, as alleged, existed at the time of the election, and still existed at the time when, more than six weeks after the election and more than four weeks after the acceptance of office, the relator applied for a *fiat*. The main facts—the employment of the respondent as an officer of the association and the association's relation to the city corporation—were known to the relator at the time of the election, and formed the basis of a prior application to unseat the respondent, which was dismissed, though not on the merits; and it was *held*, that certain additional facts which, it was said, had come to the relator's knowledge since the election and within six weeks of his second application, were merely evidentiary; and, therefore, he was not *rectus in curia*.

Semble, that the dismissal of the application would not prevent an application by another relator.

Semble, also, that, in the circumstances of the case, it was improper that the respondent should hold his seat.

MOTION by the relator for a mandatory order directing the Senior Judge of the County Court of the County of Middlesex to grant a *fiat* under sec. 162 of the Municipal Act, R.S.O. 1914, ch. 192, for the service of a notice of motion for an order declaring that the respondent “hath unjustly usurped and still doth usurp the office of Alderman for the City of London.”

The County Court Judge granted a *fiat* when first applied to by the same relator; but, by mistake, the notice of motion was not served in time; and, when the motion came on, the Judge dismissed it.

The relator made a second application for a *fiat*, which was refused by the learned County Court Judge, who gave the following reasons for judgment:—

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MACBETH, Co. C.J.:—In *Rex ex rel. Morton v. Roberts* (1912), 26 O.L.R. 263, 273, Mr. Justice Riddell points out that 3 Edw. VII. ch. 18, sec. 32, made a most important change. Before that time it was only the validity of the election which could be challenged in the statutory method—thereafter the right to hold a seat could be attacked in the same way.

(The amendments introduced by 3 Edw. VII. ch. 18 are carried into the Consolidated Municipal Act of 1903, passed in the same session.)

By sec. 33 of 3 Edw. VII. ch. 18, R.S.O. 1897, ch. 223, sec. 220, is amended by inserting therein, after the word "councillor" in the 8th line, "or in case at any time the relator shews by affidavit to such Judge reasonable ground for supposing that any member of the council . . . has forfeited his seat or has become disqualified since his election."

And the section so amended becomes sec. 220 of the Municipal Act of 1903, the effect being as follows: In case, within six weeks after an election, or one month after acceptance of office by the person elected, the relator shews by affidavit to such Judge, reasonable ground for supposing that the election was not legal, or was not conducted according to law, or that the person declared elected was not duly elected, or for contesting the validity of the election of any mayor, etc., or in case at any time the relator shews by affidavit reasonable ground for supposing that a member of the council has forfeited his seat or become disqualified since his election, the Judge shall grant his fiat, etc.

To contest the validity of the election the relator must apply within six weeks or one month after the election.

An application may be made at any time to attack the right to the seat on the ground of forfeiture or disqualification since the election. By 7 Edw. VII. ch. 40, sec. 5, sub-sec. 1 of sec. 220 of the Consolidated Municipal Act, 1903, is amended by adding after the word "time" in the eighth line thereof the words "within six weeks after the facts come to the knowledge of" and in the ninth line the word "he" after the word relator. And the subsection so amended is now sub-sec. 1 of sec. 162 of the Municipal Act, R.S.O. 1914, ch. 192.

In the case above cited, Riddell, J., held that by omitting to file a proper declaration of office an elected member of a council

forfeited his right to hold his seat, and that proceedings to unseat him might be taken within six weeks after the relator knew of the defect in the declaration.

In the present case I am asked to grant a fiat to determine the right of Ansom M. Hunt to sit in the city council. It is alleged that he was at the time of his election and still is disqualified, as being a salaried employee of the Western Fair Association, which has contractual relations with the city.

The time for contesting the validity of the election is past; and I am of opinion that I cannot now entertain any application to unseat the respondent, except on the ground that he has forfeited his seat or become disqualified *since his election*.

The relator deposes that he did not know before the 12th February last of certain facts which (it is alleged) rendered Mr. Hunt ineligible for election to the city council on the 1st January last, and still render him ineligible. The real question sought to be raised is *the validity of the respondent's election*; it is now too late to raise it. *There has been no change in his status since the election.*

The jurisdiction under sec. 161 *et seq.* is purely statutory.

It is not necessary for me to express any opinion as to whether, on the facts stated, there is reasonable ground to suppose that Mr. Hunt's connection with the Western Fair Association disqualified him from sitting in the city council.

The relator's motion for a mandatory order came before RIDDELL, J., in the Weekly Court at London, and was afterwards heard in Chambers at Osgoode Hall.

J. M. McEvoy, for the relator.

G. S. Gibbons, for the respondent.

March 31. RIDDELL, J.:—An application was made on behalf of the relator, Stephenson, to His Honour the Judge of the County Court of the County of Middlesex, for a fiat under sec. 162 of the Municipal Act, R.S.O. 1914, ch. 192, and the relator obtained a fiat which authorised him to serve a notice of motion asking "for an order declaring that Ansom M. Hunt, of the city of London, in the county of Middlesex, secretary of the Western Fair Association, hath unjustly usurped and still doth usurp the office of Alderman for the City of London, notwithstanding that the said

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Ansom M. Hunt has an interest in contracts by or with or through the Western Fair Association, which association has contracts with the Municipal Corporation of the City of London, and for an order declaring that the said relator hath an interest in the said election, and for such further or other order as may be deemed proper, upon the following among other grounds:—

“1. The said Ansom M. Hunt is and has been for some years past under contract with the Western Fair Association, the paid secretary and chief and almost sole paid administrative and executive officer of the said association, and is required by the by-laws of the said association to give his whole time to the work of the association, and the said Ansom M. Hunt is paid an annual salary of \$1,700 or thereabouts for his services as such secretary.

“2. By statute, the Municipal Council of the City of London may grant money or land in aid of the said association, and may lend or grant aid by way of bonuses to the said association out of any moneys belonging to the said municipal corporation, and may effect such loan or grant such aid upon such terms and conditions as may be agreed upon between the said association and the council of the said municipal corporation.

“3. The municipal corporation annually contributes large sums of money, more or less according to the needs of the said association, of which the said municipal council is the judge, usually about \$5,000 per annum, to enable the said association to carry on its fair, and the said secretary, with a committee of the board of the association, prepares the material shewing what are the needs of the association for the year.

“4. The said association has a contract with the said municipal corporation whereby the said municipal corporation contracts to give the said association a license to use and occupy a large part of the buildings and grounds in and upon which the said association carries on its business, which grounds are conveyed to and are now held by the Municipal Corporation of the City of London, upon certain terms and conditions set out in the said agreement, whereby, if the said association make default in the terms of the said license, the corporation may, if the municipal council see fit, acquire the interest of the said association upon payment of a certain sum of money, and whereby the said association has a right to have the said lands sold, and the said muni-

icipal corporation is to be repaid any moneys expended, and upon other terms and conditions set out in the said agreement and license and the by-laws of the said corporation dealing therewith; and, according to the terms of the said contracts, by-laws, licenses, and agreements, the said association has contracted and agreed to keep the buildings on the said lands in repair, and the question of the sufficiency of the repair is left to the decision of the city engineer or servant of the said municipal council; and, in default of sufficiency of repair according to the said contracts, licenses, and by-laws, the control of the said lands and buildings reverts back to the said corporation; and the said Ansom M. Hunt has an interest in all the said contracts and dealings of the said association with the said municipal corporation by, with, or through the said association."

By some mistake the notice of motion was not served in time, and the motion was dismissed by the County Court Judge.

In no way discouraged, the relator again applied to His Honour for a fiat to serve a notice of motion for an order declaring (as before and in the same words) on grounds Nos. 1, 2, 3, the same as before; No. 6 the same as former No. 4; No. 4, "The said Ansom M. Hunt, as the relator now learns from the records of the City of London, has repeatedly, in his capacity as secretary of the Western Fair Association, appeared before the Council of the Municipal Corporation of the City of London requesting grants and assistance from the funds of the said city;" No. 5, "It further appears as aforesaid that the said Council of the said City of London is this year raising \$10,000 in debentures for the assistance of the said Western Fair Association."

It will be seen that the grounds of the applications are really only two: (1) the respondent is the secretary of the Western Fair Association; (2) the city has such relations with the Western Fair Association, by helping it with money, making contracts with it, etc., as to make it unlawful for the servants of the Western Fair Association to be members of the council of the city.

That the respondent is such servant is not denied; and much colour is given to the second contention by such cases as *Greville-Smith v. Tomlin*, [1911] 2 K.B. 9, read in connection with the legislation (1887) 50 Vict. ch. 89 (O.)*, the by-laws of the city, No. 2439 etc.

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This application for a fiat was refused by His Honour; and an application was made before me for a mandatory order directing him to grant the fiat asked for. I declined to hear the application unless and until the respondent should be served with notice of it—that was done, and the matter has been argued before me with great candour and ability by both counsel.

The ground upon which the learned County Court Judge proceeds, if I rightly apprehend his written reasons, is that the alleged disqualification, if it exists at all, existed at the time of the election and of the first application—a judgment of my own, *Rex ex rel. Morton v. Roberts*, 26 O.L.R. 263, is cited as indicating that the statute cannot be applied in a case like this, except where there is a change in position after the election. I did not intend so to hold, and it seems to me that my language does not bear that interpretation.

That, however, in my view, is here of no moment—the relator must make his application “within six weeks after an election, or one month after the acceptance of office,” unless the facts upon which he relies did not come to his knowledge until after the election, when he has six weeks after the facts came to his knowledge: R.S.O. 1914, ch. 192, sec. 162 (1). The “facts” are the “ground,” and, if the “facts” which form the real ground for the application are known at the time of the election, the time will not be extended simply because the relator afterwards becomes aware of facts which are mere evidence of such ground, mere evidentiary facts of no significance except as proving another fact or other facts.

The only new “facts” alleged in the second application are two: (No. 4) that the respondent has frequently appeared before the Council of London to solicit aid for his association; and (No. 5) that the city is going to give the association \$10,000 this year.

As to No. 4, that simply is evidence to prove the relationship of the respondent to the Western Fair Association, already known, as appears from No. 1 above—and that he did what was to be expected of him in such relationship.

As to No. 5, that is simply saying that this year is no exception from the rule of the city annually contributing large sums of money—but that, instead of contributing about \$5,000 as usual, the city this year will contribute \$10,000. A contribution of \$5,000 is as obnoxious to the statute as one of \$10,000.

I cannot see that any new case is made out.

The impropriety, gross and palpable, of this secretary and chief officer of the Western Fair Association occupying a seat at the council-board of the city, under the circumstances, should be manifest to the most obtuse. But this relator is not *rectus in curiâ*.

I dismiss this motion; but it must be borne in mind that the dismissal does not in any way prevent an application by another relator, unless the respondent prevents it by vacating his seat.

There will be no costs.

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JEFFREY v. ALYEA.

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Contract—Statute of Frauds—Husband and Wife—Promise of Wife to Pay Debt of Husband—Consideration—Oral Guaranty—Judgment Recovered against Husband—Finding of Joint Primary Liability—Reversal on Appeal.

The plaintiff sued two defendants, husband and wife, for the balance of the price of goods sold by the plaintiff to the husband. It appeared that the plaintiff threatened to stop the goods *in transitu* if the price was not paid, that the wife then orally promised the plaintiff to pay, and that the plaintiff did not carry out her threat. The plaintiff obtained in this action judgment against the husband for the amount sued for:—

Held, that what the wife promised to pay was the debt of her husband; and while the promise and the consideration were shewn, the promise, not being in writing, did not satisfy the Statute of Frauds, and was not enforceable.

Per RIDDELL, J.:—The question whether each particular case comes within the statute or not depends on the fact of the original party remaining liable, coupled with the absence of any liability of the person sought to be charged or his property, except such as arises from his express promise.

Beard v. Hardy (1901), 17 Times L.R. 633, *Davys v. Buswell*, [1913] 2 K.B. 47, 53, 54, and *Young v. Milne* (1910), 20 O.L.R. 366, specially referred to, among other cases cited.

Judgment of the County Court of the County of Hastings, finding that there was a joint primary liability, reversed.

APPEAL by the defendant Florence Alyea from the judgment of the Senior Judge of the County Court of the County of Hastings, in favour of the plaintiff, in an action against the appellant and her husband for a balance of the price of apples sold to the defendants, as the plaintiff alleged.

The question on the appeal was, whether the appellant, as well as her husband, was liable for the price of the apples. Judgment was given against the husband at the trial, and as to that there was no appeal.

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March 14. The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and MASTEN, JJ.

F. E. O'Flynn, for the appellant, argued that the appellant's "guarantee" was a promise to pay the debt of another, and, not being in writing, was void under the Statute of Frauds. He referred to *Rounds v. May* (1874), 35 U.C.R. 367; *Lee v. Mitchell* (1864), 23 U.C.R. 314; *James v. Balfour* (1882), 7 A.R. 461; Addison's Law of Contracts, 11th ed., p. 31.

E. G. Porter, K.C., for the plaintiff, respondent, contended that the appellant's promise to pay made her a joint primary debtor, and that she was personally liable. The evidence shewed that she intended to assume the debt, and it was only on that understanding that the apples were delivered.

O'Flynn, in reply.

March 31. MEREDITH, C.J.C.P.:—It seems to be needful only to state the facts of this case to make it very evident that the trial Judge erred in considering that he should hold the two defendants liable for the one debt to the plaintiff.

The defendant Alyea, who is the husband of the other defendant, bought from the plaintiff, as the trial Judge found, all the fruit of her orchard of the year 1912, for \$700; and before that bought from her some other small quantities of fruit, the price of which, with the \$700, make up the total amount of the plaintiff's claim, which was very considerably reduced by payments on account of it made by the defendant Alyea.

In regard to the female defendant, the plaintiff's story, given effect to, with some doubt, by the trial Judge, is: that she was unwilling to deliver the last 293 barrels of the apples under her contract with Alyea until she was paid the amount that would be then due to her from him, and refused to do so until, as she first stated it in her testimony at the trial, "Mrs. Alyea guaranteed to pay me." Subsequently she testified that Mrs. Alyea said, she would pay her, and again, that she would pay for them. On the plaintiff getting this verbal guaranty, the apples were delivered to the defendant Alyea, under the terms of his purchase of them; his wife got nothing.

Two witnesses were called in the plaintiff's behalf, and their testimony turned the scale in her favour, at the trial, and each testified that Mrs. Alyea "guaranteed" payment.

There is no contention, nor was there any suggestion at the trial, that the contract with the defendant Alyea was ever rescinded or varied; on the contrary, he received and sold all the apples, and he has hitherto been treated as a debtor liable under his contracts to purchase, as originally made, and accordingly was rendered an account, and made payments, from time to time, upon it; and in this action, after a contested trial, on the question whether he was really a purchaser from, or only a selling agent for, the plaintiff, judgment has been entered up against him for the balance of the plaintiff's account against him.

So that it is quite obvious that Mrs. Alyea's promise could have been only to pay the debt of another; and, not being in writing, cannot be enforced in this action.

It is very difficult for me to understand how the trial Judge could consider her obligation a joint primary one; by what means she could, without the consent or knowledge of the debtor—of which there was none—assume such a character. The Judge speaks of a distinct promise on her part to pay; but there must, equally, be such a promise from a surety as well as from a principal debtor. He also speaks of a good consideration, but in either case, equally, there must be that. A promise to pay, in such a case as this, must be ambiguous until we know what it is that is to be paid. In this case it was, and could be, nothing but the defendant Alyea's indebtedness to the plaintiff. The testimony of the witnesses upon which the judgment against the woman is based was that the promise was a "guaranty;" and there is no ambiguity in that word.

The appeal must be allowed; and the action, as against Mrs. Alyea, dismissed—both with costs.

LENNOX, J.:—I agree.

RIDDELL, J.:—This is an appeal by Mrs. Alyea, the female defendant, from the judgment of the Judge of the County Court of the County of Hastings which made her liable to the plaintiff for \$387 and interest, as well as her husband, who is undoubtedly liable.

The facts taken from the evidence of the plaintiff are, in my view, sufficient to dispose of the appeal.

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Orby Alyea, the husband of the appellant, bought from the plaintiff the fruit of an orchard on terms in law equivalent to cash on delivery.

Some of the apples were delivered, and in part paid for—part had been shipped to Winnipeg, and the plaintiff became anxious about her money. The appellant telephoned to the plaintiff to ship the apples, the plaintiff asked who would pay for them, and the appellant said she would—the plaintiff went to see the appellant, and the appellant again told her to ship the apples and she would pay for them. The plaintiff thereupon delivered the apples on the dock where the others had been delivered, and later on went with witnesses to see the appellant, told her that she would “garnishee” (i.e., stop *in transitu*) the apples if she did not pay for them—the appellant said she was worth it and would pay. Thereupon the plaintiff abandoned her intention of stopping *in transitu*.

The present proceedings (whether their form be regular or not, we need not inquire) are in substance an action against the appellant and her husband for the price of the apples—or rather the balance of the price.

The evidence does not any where place the rights of the plaintiff any higher than as already indicated.

In my view, the case is wholly covered by such cases as *Beard v. Hardy* (1901), 17 Times L.R. 633. There, the defendant’s husband having incurred a debt to the plaintiff in respect of dealings between them, the defendant verbally promised the plaintiff to pay the amount in consideration that legal proceedings should not be taken against her husband. The Court of Appeal held that this was a promise within the statute, and, not being in writing, was not enforceable.

From *Chater v. Beckett* (1797), 7 T.R. 201, to *Davys v. Buswell*, [1913] 2 K.B. 47, the rule had been followed that “the question whether each particular case comes within . . . the statute or not depends . . . on the fact of the original party remaining liable, coupled with the absence of any liability on the part of the defendant or his property, except such as arises from his express promise:” *per* Vaughan Williams, L.J., [1913] 2 K.B. 47, at pp. 53, 54.

The same principle has been adopted and consistently applied

in the Courts of Ontario: see *Lee v. Mitchell*, 23 U.C.R. 314; *Rounds v. May*, 35 U.C.R. 367; *James v. Balfour*, 7 A.R. 461; *Beattie v. Dinnick* (1896), 27 O.R. 285; *Bailey v. Gillies* (1902), 4 O.L.R. 182; *Young v. Milne* (1910), 20 O.L.R. 366.

The debt which was to be guaranteed was the debt of the husband then existing or in contemplation, and the promise did not and was not intended to extinguish that debt, there was no release, no novation—nothing but an undertaking to pay that debt.

If there were any doubt on the facts already set out, that doubt must disappear when the other facts are made to appear—these also, I take from the plaintiff's evidence.

After the first promise by the appellant and after the delivery, the plaintiff saw Alyea, who said that he was going to Winnipeg, and that he would take up a certain note she owed one Ostrom; told her to go to his place and she would get the note; she did so, and the appellant gave her the note "on the apple deal," and, as the plaintiff admits, "on Orby Alyea's account." She wrote out a receipt and signed it, saying that the note was received from Orby Alyea. Later on, she received a pig from Orby Alyea, "asked him for a pair of pigs, and he sent me down one;" later still, she made out her account against Orby Alyea—this is of course not conclusive: see *Brown v. Coleman Development Co.* (1915), 35 O.L.R. 219, and cases cited, especially *Lakeman v. Mountstephen* (1874), L.R. 7 H.L. 17; *Mountstephen v. Lakeman* (1870), L.R. 5 Q.B. 613. She rendered no account to the appellant, and considers that Orby Alyea still owes her the balance unpaid. She has indeed sued Orby Alyea in these proceedings and obtained judgment against him on that basis—and insists on maintaining the judgment.

While agreeing with the findings of fact by the learned County Court Judge—"I think there is a good consideration and there is a distinct and separate contract between Mrs. Alyea and Mrs. Jeffrey"—I cannot agree that "it is binding upon Mrs. Alyea without any writing."

I think the appeal should be allowed with costs here and below.

MASTEN, J.:—I agree.

Appeal allowed.

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BRAZEAU v. WILSON.

Contract—Installation of Heating System in House—Failure to Heat House as Agreed—Action for Balance of Price—Counterclaim for Moneys Paid on Account—Return of Heating Fixtures—Use of Fixtures—Compensation for Breach of Contract.

The plaintiff, under an agreement with the defendant, installed a heating system in the defendant's house, and sued for a balance of the price; the defendant set up that the system installed was useless, and the material must be "scrapped:"—

Held, that the plaintiff's contract was, to put into the defendant's house a heating system that would properly heat it, and there was evidence to sustain the finding of the trial Judge that that had not been done; the result was, that the plaintiff had not furnished what he agreed to furnish, and was not entitled to the price; and to that extent the judgment of the District Court of the District of Temiskaming dismissing the action and awarding the defendant judgment on his counterclaim for the amount he had paid to the plaintiff, was affirmed.

But *held*, that the defendant was not entitled to retain the fixtures—the boiler, radiators, pipes, etc.—put in by the plaintiff; they were the property of the plaintiff.

Munro v. Butt (1858), 8 E. & B. 738, and *Oldershaw v. Garner* (1876), 38 U.C.R. 37, distinguished.

The judgment of the District Court was varied so as to give the plaintiff the right to remove the fixtures, doing no unnecessary damage, upon paying to the defendant the amount of his judgment and costs.

The defendant's use of the heating system, such as it was, for two seasons, was sufficient to compensate him for the plaintiff's breach of the contract.

Per RIDDELL, J.—The case was entirely governed by *Forman v. The Ship "Liddesdale,"* [1900] A.C. 190; the authority of which was not shaken by *Dakin & Co. Limited v. Lee* (1914), 84 L.J.Q.B. 894.

AN appeal by the plaintiff from the judgment of the Judge of the District Court of the District of Temiskaming dismissing an action to enforce a mechanic's lien for \$396.33 and awarding the defendant Wilson \$200 on his counterclaim for moneys paid on account of the contract price.

The plaintiff's contract with the defendant Wilson, the owner in equity of certain lots, was to install a heating system in a house built upon these lots.

The District Court Judge found that the system was defective, and based his judgment upon that finding.

March 14. The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and MASTEN, JJ.

J. M. Ferguson, for the appellant, argued that he had substantially performed his contract, and should recover upon a *quantum meruit*. The respondent had retained the benefit of

the appellant's work and materials and should pay for them: *Dakin & Co. Limited v. Lee* (1914), 84 L.J. K.B. 894. If the chimney which the respondent had built had possessed a sufficient draught, the plaintiff's heating apparatus would have fulfilled all requirements.

E. B. Ryckman, K.C., for the defendant Wilson, respondent, contended that the appellant had not even substantially performed his contract, because the boiler which the plaintiff had installed was too small to heat the system. Nor was the heat properly distributed through the house. The plaintiff was not entitled to anything by way of *quantum meruit*: *Munro v. Butt* (1858), 8 E. & B. 738; *Summers v. Beard* (1894), 24 O.R. 641; *Anderson v. Fort William Commercial Chambers Limited* (1915), 34 O.L.R. 567. The materials would have to be scrapped.

J. Y. Murdoch jun., for the defendant company.

March 31. MEREDITH, C.J.C.P.:—The evidence on each side is unsatisfactory; no reasonable effort seems to have been made fairly to try out the matters in question in this action; and, if the case had been tried before me, I should have declined to deal with it on such efforts, and would have availed myself of the right, afforded by the practice, to appoint some competent person to make the necessary examination of the work in question and give an impartial report, and, if necessary, give evidence, upon the matters in question: see Rule 268. But the case must now be dealt with upon the evidence which the parties chose to adduce, and upon that evidence it is plain—indeed it is admitted by the plaintiff—that he was to put into the defendant's house a heating system that would properly heat it, and there is evidence upon which it might be found, as the trial Judge has found, that that has not been done.

The plaintiff's attempt to put the blame on the defendant for not building a better chimney was not given effect to at the trial, and cannot be here; the plaintiff knew the condition of the chimney, and should not have contracted as he did except upon the condition that better draught should be supplied by the defendant, if he then really thought the flue insufficient.

The result is, that the plaintiff has not furnished that which he contracted to supply; he has not substantially fulfilled his

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contract, and so is not entitled to the price that was to be paid to him on fulfilment of the contract; and to that extent the judgment is right. But the defendant is not entitled to retain the boiler, radiators, pipes, etc., put in by the plaintiff. The defendant recovers, according to his defence on which the judgment in appeal is based, on the ground that the whole work is useless, and must be, as he terms it, scrapped, which means necessarily taking out and discarding these articles. When so taken out, they must be the property of the plaintiff, not of the defendant, and the plaintiff is then entitled to them. The principle applied in such a case as *Oldershaw v. Garner*, 38 U.C.R. 37, adopting and following the ruling in *Munro v. Butt*, 8 E. & B. 738, is obviously not applicable to such a case as this, to fixtures which are to be unfixed and taken out, or, as I really think was intended by the defendant, not to be taken out, but to be utilised for his benefit under a new contract for the heating of his house.

The judgment in appeal should be varied so as to give to the plaintiff the right to remove the boiler, radiators, pipes, etc., doing no unnecessary damage, during the month of June next, upon paying to the defendant the amount of his judgment and costs.

The result is, that the plaintiff recovers his goods, and the defendant his money. In addition to that, the defendant has had two seasons' use of the heating system, such as it was, which is sufficient to compensate him for the plaintiff's breach of the contract.

There should be no order as to the costs of this appeal. This applies to all parties to the appeal.

LENNOX and MASTEN, JJ., concurred.

RIDDELL, J.:—An appeal from the judgment of His Honour Judge Hartman, at Haileybury, in a mechanic's lien proceeding.

The plaintiff, a plumber and steam-fitter, entered into a contract with Wilson, the owner in equity of certain lots in the town of Timmins, which he held under an agreement to purchase from the Timmins Town Site Company Limited, to install a heating system in his house on these lots.

Wilson did not understand anything about what was requisite;

the plaintiff went up and measured the house, and made his tender at \$590. The tender states the boiler to be a 30F.; but, afterwards, Brazeau made up his mind to put in and did put in a 20F., without interference from Wilson. Brazeau knew that Wilson relied upon his (Brazeau's) expert knowledge, that he was not selling so much iron &c., but agreeing to put in a heating plant sufficient to heat the house properly and with an even temperature from room to room.

The learned Judge has found, and the evidence supports his finding, "the system defective in that the boiler is not sufficiently large to heat the system properly, nor is the heat equally or properly distributed throughout the house"—in other words, the plaintiff has not completed his contract.

I think the case is entirely governed by *Forman v. The Ship "Liddesdale,"* [1900] A.C. 190. The plaintiffs had an entire contract to effect certain specified repairs on a ship; they did not do exactly as specified, but what (they said) was equivalent or better—the owner of the ship would not pay, but took the ship and sold it. It was held, following *Appleby v. Myers* (1867), L.R. 2 C.P. 651, that, as the plaintiffs were contractors for a lump sum and had not completed the prescribed work, they could not recover anything—and that the defendant, by taking possession of his own property and doing the best he could with it, did not thereby acquiesce in and ratify what the plaintiffs had done.

The authority of this case is in no way shaken by *Dakin & Co. Limited v. Lee*, 84 L.J. K.B. 894, 900—the present case comes under Mr. Justice Sankey's second exception.

I would dismiss the appeal without costs.

By consent the plaintiff is to be allowed to remove his materials. This logically would imply his doing no unnecessary damage, and would be without prejudice to the defendant's right of action for breach of contract &c.; but, to put an end to this litigation, I agree with the disposition made by my Lord.

Appeal allowed in part.

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[APPELLATE DIVISION.]

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Sale of Goods—Refusal to Accept—Ground of Refusal—Request for Guaranty—Breach of Contract—Right of Inspection—Refusal to Permit Inspection—Tender—Waiver.

The defendant sent to the plaintiff, carrying on business at Ingersoll, Ontario, an order for two car-loads of flour to be shipped to Montreal, Quebec, f.o.b. Montreal. The order was accepted, and the flour was shipped. After certain communications between the parties, the defendant refused to accept; the plaintiff resold at a loss, and brought this action for damages for non-acceptance:—

Held (MASTEN, J., dissenting), that the defendant in fact refused to accept because the plaintiff would not undertake to protect the defendant in writing against loss if he took up the bills of lading of the flour, and if his buyers, on a resale by him, would not take delivery owing to quality; and that the defendant had broken the contract; and was liable for damages. Judgment of the County Court of the County of York reversed.

Per MEREDITH, C.J.C.P.:—There was no refusal to permit inspection. Whether the defendant had or had not a right to inspect before taking up the plaintiff's bill of exchange for the price of the flour and the bills of lading attached to it, depended upon the contract: if that were to pay the bill of exchange at sight, provided the bills of lading were transferred to him then, he could not delay payment until a later arrival of the goods; whilst, if the contract were to pay only on delivery, the buyer had a right to see that he got that which he bargained for before paying and before receiving the goods offered; and it was impossible to tell, from the evidence adduced at the trial, what the contract between the parties, in that respect, really was.

Per RIDDELL, J.:—The defendant had the common law right to inspect; on the evidence, it may be considered that the defendant was refused permission to inspect, and the plaintiff made no tender. The defendant, however, not having cancelled the contract specifically on the ground of refusal to permit inspection, must be considered as having waived the right to inspect. The defendant could not be allowed to change his position and set up that the cancellation was due to the failure to permit inspection, and not to the refusal to comply with a request for a guaranty, which the plaintiff had a right to refuse.

Per LENNOX, J.:—The defendant had the right to inspect, but did not demand permission to inspect, and so there was no refusal. What the defendant insisted upon was the right to sample the flour, which involved a good deal more than what is generally understood by inspection or examination. The defendant had nothing to complain of, in view of a warranty (as to the quality of the flour) which the plaintiff actually delivered, and never recalled.

Per MASTEN, J.:—The defendant had the right to inspect. Permission to inspect was asked by the defendant and refused by the plaintiff. The proposed guaranty never came to anything, the parties not being *ad idem*. There was nothing in the defendant's request for protection against loss that precluded him from insisting upon his ordinary right to inspect the flour.

E. Clemens Horst Co. v. Biddell Brothers, [1912] A.C. 18, upon the question of the right to inspect, was considered by all the members of the Court, and distinguished.

APPEAL by the plaintiff from the judgment of COATSWORTH, Jun.Co.C.J., dismissing, after trial without a jury, an action brought

in the County Court of the County of York, to recover damages for non-acceptance of two car-loads of flour shipped by the plaintiff from Ingersoll to the defendant at Montreal.

The learned County Court Judge held that the defendant was entitled to inspect the flour, at the place of delivery, Montreal, before payment; that the plaintiff refused to allow the defendant to inspect; that that was the reason why the transaction was not carried out; and that, consequently, the plaintiff failed to establish his cause of action.

March 15. The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and MASTEN, JJ.

M. C. McLean, for the appellant, argued that, in the first place, there was no right to inspect. At any rate, there was no refusal to inspect. If there was refusal, then such refusal was not the cause of the defendant's repudiation of the contract, and the refusal of inspection was waived. He referred to *George v. Glass* (1857), 14 U.C.R. 514.

James Haverson, K.C., for the defendant, respondent, relied upon the judgment of the learned County Court Judge, for the reasons given by him (quoted by RIDDELL, J., *infra*); and referred to *Biddell Brothers v. E. Clemens Horst Co.*, [1911] 1 K.B. 214, 934; *E. Clemens Horst Co. v. Biddell Brothers*, [1912] A.C. 18.

March 31. MEREDITH, C.J.C.P.:—The trial Judge seems to have heard the evidence in this case three weeks before pronouncing his judgment, and in the interval must have, in some way, come into an erroneous view of the facts of the case, because, in his judgment, he states, in positive terms, that the plaintiff refused to permit the defendant to inspect the flour in question, and that because of that refusal the transaction in question fell through; whereas in fact even the defendant abstained from testifying to any refusal to permit inspection, whilst the plaintiff testified very positively that not only was there no such refusal, but that inspection was never asked for or mentioned; and the transaction in truth fell through because the plaintiff would not undertake to protect the purchaser in writing against loss if the defendant took up the bills of lading of the flour, and if his buyers—on a resale by him—would not take delivery owing to quality.

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As to this last mentioned fact there is no room for controversy; it is all in writing over the signature of the defendant, a writing which does not, even in the remotest way, mention the subject of inspection. This writing also, in the plainest terms, for the reason I have mentioned, and for that only, breaks the contract, informing the plaintiff, as it does, that the bank has been instructed by the defendant to return the drafts, and that the cars containing the flour are now at Montreal at the plaintiff's order. And it could not be, and is not, contended that the defendant had any such right to reject the goods.

The case therefore seems to me to be a very plain one for allowing the appeal and directing that judgment be entered in the Court below for the plaintiff and damages in the amount of the loss of the plaintiff upon the resale made by him following upon the defendant's breach of his contract, with costs here and there.

The question, much discussed upon the argument of the appeal, whether the defendant had a right to inspect before taking up the plaintiff's "draft" for the price of the flour and the bills of lading attached to it, was really wasted energy, on the indisputable facts of this case: but I may say that whether he had or not depended upon his contract: if that were to pay the bill of exchange at sight, provided the bills of lading were transferred to him then, it is obvious that he could not delay payment until a later arrival of the goods; whilst, if the contract were to pay only on delivery of the goods, it need hardly be said that the buyer had a right to see that he got that which he bargained for before paying and before receiving the goods offered. There is no complication of any character involved in such a question; the difficulty lies only in discovering what the contract really was. In the case of *E. Clemens Horst Co. v. Biddell Brothers*, [1912] A.C. 18, it was eventually held that the contract was to pay on delivery of the symbols of ownership of the goods, that is, the bills of lading: but, even in that case, the right of the purchaser to see that he got that which he bought seems to have been recognised, and to have been but shifted back to the time when he took the goods under his bills of lading. In this case, it is impossible to tell, from the evidence adduced at the trial, what the contract between the parties really was: all that I can find upon the subject is contained in these words, "subject to our terms and conditions," printed in the bought

note of the goods in question; but there is no evidence of what "our terms and conditions" were, or of any other terms or conditions upon which the contract is said to have been made.

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RIDDELL, J.:—This is an appeal by the plaintiff from a judgment of His Honour Judge Coatsworth, of the County Court of the County of York, dismissing the plaintiff's action for damages for non-acceptance of certain flour sold by him to the defendant.

The defendant, trading under a firm name and carrying on business in Toronto and Montreal, sent to the plaintiff, carrying on business in Ingersoll, an order in the following terms:—

"Morrow Cereal Company.

"Toronto, February 16, '15"

"To C. C. Morrison.

"Address, Ingersoll, Ont.

"Please ship to Montreal, subject to our terms and conditions, via G.T.R. . . . at once 2 410-bag cars 98's 90% patent Ontario winter wheat flour \$6.60 per barrel, f.o.b. Montreal.

"Morrow Cereal Company,

"Per Morrow."

The order was accepted, and one car went forward on the 17th February, and another on the 20th February: after certain communications between the parties, the defendant refused to accept—the plaintiff resold at a loss, and sued for the damages—but, as has been said, failed.

The ground upon which the learned County Court Judge proceeded, appears from his reasons for judgment: "The whole question turns on the right of the defendant to inspect the flour in Montreal, the place of delivery, before payment. It is quite clear from the evidence that the plaintiff refused the defendant the right to inspect to see if up to grade, and it was on that account that the transaction fell through and the plaintiff was compelled to resell; and, in these circumstances, I hold, under the authority submitted to me, that the defendant was entitled to inspect the flour. Consequently, the plaintiff must fail."

In an action such as this, for refusal to accept goods sold, ad-

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mittedly the plaintiff must prove a proper tender; and, as will be seen, the learned County Court Judge found that there was no tender sufficient to saddle the defendant with liability.

Upon the appeal three points were attempted to be made: (1) that there was no right to inspect; (2) that there was no refusal of inspection; and (3) that the refusal of inspection, if it existed, was not the cause of the defendant's repudiation of the contract, and therefore the refusal to permit inspection was waived.

That on a sale of goods the rule is at the common law the same as sec. 34(2) of the Sale of Goods Act, 1893, is well established: *Isherwood v. Whitmore* (1843), 11 M. & W. 347; *Startup v. Macdonald* (1843), 6 M. & G. 593, at p. 610; Benjamin on Sale, 5th ed., p. 740; Halsbury's Laws of England, vol. 25, p. 229.

The Code thus expresses the rule: "Unless otherwise agreed, when the seller tenders delivery of goods to the buyer, he is bound, on request, to afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract."

It is, however, argued that this law has been cut into or modified by a recent decision of the House of Lords—and it will be necessary to consider this contention.

When the facts are looked into, it is at once seen that this case, *Biddell Brothers v. E. Clemens Horst Co.*, [1911] 1 K.B. 214, 934, and, in the House of Lords, *E. Clemens Horst Co. v. Biddell Brothers*, [1912] A.C. 18, has no bearing upon the present question—it simply determines the rights of parties under the peculiar "c. i. f. contract." Where goods are sold c.i.f., the seller must: (1) "ship at the port of shipment goods of the description contained in the contract;" (2) "procure a contract of affreightment, under which the goods will be delivered at the destination contemplated by the contract;" (3) "arrange for an insurance upon the terms current in the trade which will be available for the benefit of the buyer;" (4) "make out an invoice in" the proper form; and (5) "tender these documents to the buyer so that he may know what freight he has to pay and obtain delivery of the goods, if they arrive, or recover for their loss if they are lost on the voyage. Such terms constitute an agreement that the delivery of the goods, provided they are in conformity with the contract, shall be delivery on board ship at the port of shipment. It follows that against

tender of these documents, the bill of lading, invoice, and policy of insurance, which complete delivery in accordance with that agreement, the buyer must be ready and willing to pay the price." *per* Hamilton, J., in [1911] 1 K.B. at pp. 220, 221. In such a contract, admittedly, if the goods are lost on the voyage, the loss is the purchaser's; and what the purchaser has to pay is "cost, insurance, and freight." Hamilton, J., held that, in such a contract, it was not necessary for the vendor to await the arrival of the goods at the port of destination before being entitled to his pay: the Lords Justices reversed this finding, but it was restored by the House of Lords.

The result was that the purchaser had no right to defer payment until after inspection, which would involve some delay from the time of the tender of the documents upon which his liability to pay arose immediately under the "c.i.f. contract." No doubt was cast upon the right to inspect under the ordinary contract.

In the present case, the vendor, not the purchaser, pays freight and insurance (if any), and the insurance is that of the vendor; the purchaser pays cost, only one of the triad, *c.*, *i.*, and *f.*; the liability to pay arises on the tender of the goods at Montreal *f.o.b.*, not on the tender of the (or any) documents.

It is impossible to hold that the common law right to inspect was wanting.

2. Was the right demanded and refused?

The plaintiff swears that he had no objection to the inspection of the flour; the defendant gives this account of the conversation, which was by telephone: "I called Mr. Morrison up on the 25th, and I asked him for permission to sample the car of flour, and he told me that he would guarantee the flour to be 90 per cent., but did not say that he would permit us sampling it; but, without permission to sample it, we had no authority to go to the railway and say to the railway: 'We have got permission to sample this car.' " (This was on the 25th February.)

Nothing further is said by the defendant—he does not repeat his request, the matter of inspection is allowed to drop; there was no repudiation of the contract on that ground—it is impossible, I venture to think, to find that this was a refusal of the right to inspect—and, if the law requires an express refusal on the part of

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the vendor, the purchaser did not acquire a right to cancel by this conduct of the vendor.

In *Isherwood v. Whitmore*, 11 M. & W. 347, there was an express refusal "to allow the defendants to open the casks or to inspect their contents" (p. 348), and it is in relation to that fact that the words of the learned Barons are employed. Parke, B., at p. 350: "A tender of goods does not mean a delivery or offer of packages containing them, but an offer of those packages, under such circumstances that the person who is to pay for the goods shall have an opportunity afforded him, before he is called on to part with his money, of seeing that those presented for his acceptance are in reality those for which he has bargained." Alderson, B., at p. 352: "It was necessary to satisfy them (the jury) that the defendants . . . had an opportunity of inspecting the articles."

In the same case on special demurrer (1842), 10 M. & W. 757, 764, the full Court had held that to prove an allegation of tender of goods "the plaintiff would be bound to shew a delivery under such circumstances that the defendants had an opportunity of seeing that the article delivered to them was the one they had stipulated for:" *per* Parke, B., with whom concurred Alderson, Gurney, and Rolfe, BB.

In *Startup v. Macdonald*, 6 M. & G. 593 (Cam. Scacc.), the goods were tendered at 8.30 p.m. of the last day, but early enough to enable the purchaser to examine, weigh, and receive them before midnight. Rolfe, B., with whom Gurney, B., agreed, said (p. 610) that the tender was sufficient, "provided only that the tender has been made under such circumstances that the party to whom it has been made, has had a reasonable opportunity of examining the goods . . . tendered, in order to ascertain that the thing tendered really was what it purported to be"—as he says on p. 613, "under circumstances which gave him full opportunity to weigh, examine, and receive it." Much the same language is used by the other Judges; and Lord Denman, C.J., who dissented, did so on the facts, not the law.

The case of *George v. Glass*, 14 U.C.R. 514, cited by Mr. McLean, does not seem to be helpful—there the defendant, the purchaser, was held liable because he did not "go or send for the flour, or . . . have it examined in order to prove its quality . . . though he had fair opportunity given to him." See p. 520.

The right to inspect may of course be waived, and it will be considered to have been waived unless the purchaser demands it. Accordingly the rule, when put into the statutory form, reads: "The seller . . . is bound on request to afford the buyer a reasonable opportunity of examining the goods." I find nowhere any decision that there must be an express refusal as in the *Isherwood* case—when the request is made, it is the duty of the seller to comply with it; and, if he fail to afford the buyer the opportunity, there is **no** tender.

But of course this omission may also be waived, because it does not in itself and *ipso facto* put an end to the contract.

Unless there be more in the case, the plaintiff so far has made no tender, if we accept the evidence believed by the trial Judge; and I can see no reason why we should not.

3. The preceding day, the 24th February, the defendant had asked by telegraph that the plaintiff should protect him against loss—promising, if that were done, that he would take up the bills of lading of the two cars; on the 25th February, the plaintiff telegraphed that he would guarantee the flour "ninety per cent. winter wheat patent made from good sound winter wheat." On receipt of this telegram, the telephone communication took place, and then, at 5 or 6 p.m., the defendant wrote: "As your telegram of the 25th does not comply with our request, we have to-day instructed the bank to return the drafts, and beg to advise that the cars are now at Montreal to your order."

It is perfectly plain—indeed it is not denied—that the alleged reason gave no ground for cancelling the contract. The plaintiff might have insisted on his contract—but he preferred the alternative course always open to an innocent contractor—he accepted the revocation of the contract, retaining simply the right to sue for damages for its breach: *Johnstone v. Milling* (1886), 16 Q.B.D. 460; *General Billposting Co. Limited v. Atkinson*, [1909] A.C. 118.

The result is that he must now prove a tender within the meaning of the authorities or a waiver of it. He cannot prove a tender, and must base his action on the hypothesis that the defendant waived the right to inspect. The argument is this: the defendant had the right to say, "Since there is no tender, I shall cancel the contract," but he did not do so—he affected to put an end to the contract for an entirely different reason. So far as

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the opportunity to inspect is concerned, he had the right to demand it again and again as often as he pleased and as long. If he failed to demand again, he must be considered as having waived the right to inspect unless he cancelled specifically on that ground.

Or, looking at the matter from another point of view, suppose the vendor had discovered his mistake in not giving the opportunity to inspect, and had telegraphed his permission—if this were done before the repudiation of the contract, and within a reasonable time, there having been no express and unequivocal refusal, it should be considered sufficient. Accordingly, it should be assumed that there was a *locus pœnitentiæ* for him, and that he had rights in the premises until the purchaser exercised his right to rescind (if he had such right). Then, the contract being intact, the purchaser assumes to cancel it on grounds which are not justifiable and quite apart from the want of inspection—it seems to me that this is a waiver of the right to inspect.

“Renunciation of the contract . . . operates as a continuing waiver and discharge of all conditions precedent to the liability for the performance; such as . . . the tender of . . . goods, or the like.” Leake on Contracts, 6th ed., p. 639; *Ripley v. McClure* (1849), 4 Ex. 345.

Paraphrasing the language of Parke, B., delivering the judgment of the Court in that case, the conduct of the defendant here was equivalent to saying: “As you will not guarantee me against loss, you need not take the trouble to give me an opportunity to examine the flour, for I have told the bank to send back the bills of lading, and I never will take the flour.”

Such a case has nothing in common with the master and servant cases in which the master has more than one cause to dismiss and fails to mention the cause which in law justifies a dismissal: *McIntyre v. Hockin* (1889), 16 A.R. 498; *Tibbs v. Wilkes* (1876), 23 Gr. 439; *Baillie v. Kell* (1838), 4 Bing. N.C. 638, at p. 654; *Spotswood v. Barrow* (1850), 5 Ex. 110. In such cases the mischief had been done, and nothing the plaintiff could do could set it right.

Nor is the principle of *Cowan v. Milbourn* (1867), L.R. 2 Ex. 230, applicable—there a hall had been let to the plaintiff by the defendant, who, discovering that the plaintiff intended to use the hall for blasphemous lectures, wrote him “entirely refusing the

use of the rooms, but not assigning any reason" (p. 231). The Court held that, whether this was the real motive operating on the defendant's mind or not, it was open to the defendant to refuse the use of the hall and to justify that refusal on the ground that the plaintiff had in fact this purpose in view. As Bramwell, B., says (p. 236): "You need give no reason at all. If you refuse to perform your contract, and the other party asks why, you may say, 'Go to law and I will tell you.' And your justification will depend on whether in fact and law he could compel you to perform." Here again there was no question of waiver—the plaintiff was not in a position to better himself by doing something he had omitted.

Nor do I think that the defendant here can be allowed to change his position and set up that the cancellation was due to the failure to permit inspection, and not to the refusal to comply with a request which the plaintiff had a right to refuse.

I would allow the appeal and direct judgment to be entered for the amount claimed with costs—and the respondent should pay the costs of this appeal.

LENNOX, J.:—The general law that a buyer, upon tender of goods purchased, not having previously inspected them, has a right to inspect them and reasonable time allowed him for doing so, is not, I think, open to any doubt. See Halsbury's Laws of England, vol. 25, p. 228, paras. 397 *et seq.*, and cases collected in the notes. The case of *E. Clemens Horst Co. v. Biddell Brothers*, [1912] A.C. 18, is not in conflict with this. There, by the terms of the contract, the purchaser was bound to pay immediately upon presentation of the invoice, even though the goods were then at sea or had not reached the possession of the purchaser. The case decides nothing as to the right of inspection except as controlled by the special terms of the contract there in question.

Here, the goods were sold f.o.b. Montreal, and the case therefore comes within the ordinary law, namely, that the purchaser had the right to ascertain, before acceptance of the goods, whether they were or were not according to contract, and, if not, the right to refuse acceptance. It was argued that, before asserting this right, he requested or demanded that the seller should guarantee him against loss, or, in other words, warrant the quality of the

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goods sent. This is not a right that is secured to him as a matter of law; but it was not surprising, nor perhaps unreasonable, that he should request this, in view of difficulties in reference to a purchase from the plaintiff which had just gone through. The defendant asserts that the plaintiff refused to comply with this request. I can hardly think that this is accurate. The answering telegram, at all events, offers to guarantee that the shipment will turn out to be of goods of the character of the goods ordered; and the plaintiff could hardly be expected to warrant that the defendant's vendees would not set up objections. If the goods answered the description contained in the order, that would be as much as the defendant was entitled to expect. At this stage of the controversy, I see nothing, however, that would preclude the defendant from reverting to his legal rights and insisting upon "inspection" before acceptance; but there is no evidence that this demand was ever specifically made. What was demanded was the right to sample the goods, or, to be exact, to "take samples." This may or may not be a substantial difference—it would appear to involve a diminution of quantity—how great, I have no means of judging. Small quantities of the goods can be consumed or destroyed for the purpose of testing, examination, or inspection, where there is a right to inspect, without preventing the buyer—in some cases—from afterwards rejecting the goods. There was no definite refusal of the demand of the defendant to take samples; and if, upon this contract, the defendant had a right to take samples, as distinguished from inspection or examination, doing so would not shut him out, if the goods were found to be not of the description ordered. He could still reject them, and this even if, in the faith that they were right, he had accepted a draft or made payment. Possession of goods during the time necessary for inspection, examination, or ascertainment of quality, is not the equivalent of acceptance. He must not delay for an unreasonable time, of course. The right to inspect, simply, is what was discussed upon the argument of the appeal, and I would judge that this is the way in which the issue was presented in argument before the learned Judge of the Court below. He says: "The whole question turns upon the right of the defendant to inspect the flour in Montreal, the place of delivery and payment." With great respect, I am of opinion that this question does not arise. What the defendant insisted upon was the right to sample

the flour; and this—at all events without being a good deal more specific than he was—involved a good deal more than what is usually understood by inspection or examination. At all events, if the defendant had the right to take samples, he had it without any consent of the plaintiff, and should have exercised it. If the contract did not confer this right, the defendant had nothing to complain of—and particularly has he no moral or equitable right, in view of the warranty the plaintiff actually delivered, and never recalled.

It matters not that the defendant as a matter of law did not need it. It was “a further assurance,” and cogent evidence of good faith.

After some hesitation, but, upon going into the matter carefully, now without hesitation, I think the appeal should be allowed and judgment entered for the plaintiff with costs here and below.

MASTEN, J.:—The plaintiff sold to the defendant two carloads of flour, f.o.b. Montreal. He shipped the flour to Montreal, but the defendant, under the circumstances hereinafter stated, declined to accept it. The flour was resold, and this action is now brought by the plaintiff to recover the loss sustained by him on resale. The action was dismissed by Coatsworth, County Court Judge, who presided at the trial, and this is an appeal from his decision.

The defendant disputes the plaintiff's claim on the ground that, before accepting the flour in Montreal, he was entitled to inspect it; and that, inspection being asked by him and refused by the plaintiff, he was under no obligation to accept delivery and to pay for the flour.

Three points are presented for consideration: (1) that inspection was never asked by the defendant, and, if asked, was never refused by the plaintiff; (2) that under the decision of the House of Lords in *E. Clemens Horst Co. v. Biddell Brothers*, [1912] A.C. 18, the right of inspection did not obtain in this case; (3) that, by the act of the defendant in proposing a guarantee in lieu of inspection, his right of inspection was waived.

I deal with these points in order. First, on the question of fact. It appears that the defendant had had some difficulty in connection with previous shipments owing to the unsatisfactory

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quality of the flour received by him from the plaintiff; and, in connection with the present shipment, he insisted on his right to inspect the flour before paying the drafts which had been drawn upon him and to which the shipping bills were attached. The defendant's statement in regard to this matter appears at p. 24, line 23, of the evidence, as follows:—

“Q. What action did you take with reference to these two cars?

A. I just wanted to make sure for Ogilvie's sake and for our own benefit that this flour was not going to be turned down. I would sooner see them take the flour because I had—

“Q. And it was to your interest to get rid of it without any difficulty at all? A. Yes.

“Q. Now then, what did you do? A. I called Mr. Morrison up on the 25th, and I asked him for permission to sample the car of flour, and he told me that he would guarantee the flour to be 90 per cent., but did not say that he would permit us sampling it, but without permission to sample it we had no authority to go to the railway and say to the railway, ‘We have got permission to sample this car.’ We were left really out of the transaction because we could not get Ogilvie to sample it, nor could we sample it ourselves without permission of Mr. Morrison or the bank who held the bill of lading.

“Q. Now, that was what day? A. 25th of February.

“Q. Then there are two telegrams there, one from you and reply to it, in which you ask him to guarantee the flour? A. Yes.

“Q. And he replies by saying that he will? A. Yes.

“Q. Why did not that end it? A. Well, that was not sufficient to hold Mr. Morrison, because his idea of a 90 per cent. patent and Ogilvie's might be altogether different; they were expert flour people. They have a chemist there.

“Q. You wanted it sampled? A. Yes, I wanted it sampled to see we got exactly what we bought, because the other car had been refused by them. Now, without that permission we could not sample the car.

“Q. Was that the only reason you had for refusing it? A. I had no other reason because I went into the market a couple of days afterwards and paid the same price for flour.”

On cross-examination the defendant says:—

“Q. That was very misleading to Mr. Morrison; you were

referring to these two cars? A. No, I was not; I could not have been because he understood over the telephone the reason why we had wired him.

"The Court: Q. You say you did not have the conversation over the telephone? A. I had conversation the next day over the telephone, 25th.

"Q. Tell us exactly what took place on the 25th? A. I called Mr. Morrison up and told him that Ogilvie had refused the previous car of flour owing to the quality not being a 90 per cent. patent Ontario winter wheat flour; and, while I had taken up the bill of lading on that car, I could not take it up on the other two cars, for the reason that previous car had not been satisfactory; but, if he would permit us sampling or Ogilvie sampling, we would take delivery of the cars, providing the quality was satisfactory.

"Q. What did he say to that? A. He said that he would guarantee the flour would be a 90 per cent. winter wheat flour, but he did not say that he would permit us to sample it.

"Q. Did not you insist on sampling it? A. I did insist on sampling it; I told him that was the only reason—

"Q. Did you end that conversation in disagreement? A. No, but I told him that we could not under any condition.

"Q. You did end in a disagreement? A. Yes.

"Q. You insisted on sampling? A. Yes.

"Q. And you did not agree then that day on the telephone? A. No.

"Q. You came to no arrangement? A. Not as regarding the sample.

"Q. And then you sent the telegram next day? A. Yes.

"Q. And got his reply guaranteeing quality again? A. Guaranteed quality to be 90 per cent. patent but not permitting sampling."

The trial Judge in his judgment says: "It is quite clear from the evidence that the plaintiff refused the defendant the right to inspect to see if up to grade, and it was on that account that the transaction fell through, and the plaintiff was compelled to resell."

I see no reason, upon the evidence quoted above, for reversing the finding of the trial Judge, which, I think, should be maintained.

With respect to the second point, namely, the case of *E. Clemens Horst Co. v. Biddell Brothers*, it does not appear to me that that

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decision has any application to the facts of this case. That was a contract of sale on "c.i.f." terms. The rights under such a contract are set forth by Hamilton, J. (*Biddell Brothers v. E. Clemens Horst Co.*, [1911] 1 K.B. at p. 220); and the effect of it is that the price is payable against shipping documents without actual tender of the goods. See the statement of Loreburn, L.C., [1912] A.C. at the foot of p. 22 and the top of p. 23. But in the present case the goods were deliverable f.o.b. Montreal. The property in them remained in the seller; and, subject to the discussion of the third point, there was no act on the part of the seller waiving his right of inspection.

With respect to the third point, namely, substitution by consent of the parties of a guaranty for the right of inspection: the fact, as I understand it, is that the defendant proposed that the plaintiff should guarantee him against all loss. The plaintiff proposed to guarantee that the flour was "ninety per cent. winter patent made from good sound winter wheat;" so that the proposed guaranty never came to anything, the parties not being *ad idem*.

The matter is concluded by the defendant's letter of the 25th February, 1915, exhibit 5, which reads as follows:—

"Morrow Cereal Company.

"Toronto, February 25, 1915.

"C. C. Morrison, Esq.,

"Ingersoll, Ontario.

"Dear Sir:—Under separate cover we are sending a sample of flour from car 112682 shipped to Montreal on January 30. As this car was refused by one of our buyers, we wired you on the 24th instant as follows: 'On receipt of telegram from you stating you will protect us against loss we will take up bills lading on 2 cars buyers won't take delivery owing to quality.' As your telegram of the 25th does not comply with our request, we have to-day instructed the bank to return the drafts, and beg to advise that the cars are now at Montreal to your order.

"Yours truly,

"Morrow Cereal Company,

"Per G. Allen."

I am quite unable to discern anything in this that precluded the defendant from insisting upon his ordinary right to inspect the flour.

For these reasons, I am of opinion that the judgment of the County Court Judge was right and should be affirmed, and that costs should follow the event.

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Appeal allowed; MASTEN, J., dissenting.

[APPELLATE DIVISION.]

MCLEOD v. SAULT STE. MARIE PUBLIC SCHOOL BOARD.

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July 3.

1916

April 3.

Contract—Erection of Building—Right of Contractor to Appropriate Stone Taken out in Excavating for Foundations—Conversion—Tort—Counterclaim—Costs—Absence of Concrete Footings—Allowance against Contract Price—Construction of Contract—Finding of Trial Judge—Appeal.

The plaintiffs, contractors for the building of a school-house, in excavating for the foundations, took out of the defendants' land a quantity of stone, and sold it as their own. No custom or usage was proved, and there was nothing in the evidence nor in the contract or specifications which threw much light upon the matter. The specifications shewed that excavated earth was to remain the property of the defendants; it was also provided that the plaintiffs were to keep trimmed up in piles all materials delivered to the work "and all refuse, rubbish, and other materials not removed;" and, further, that the plaintiffs should promptly remove all materials rejected and all rubbish:—

Held (MEREDITH, C.J.O., dissenting), that the plaintiffs were not entitled to remove the stone, and were liable to the defendants for the value thereof—no intention on the part of the defendants to abandon it being deducible from the evidence or the circumstances.

Robinson v. Milne (1884), 53 L.J. Ch. 1070, and *Elwes v. Brigg Gas Co.* (1886), 33 Ch. D. 562, distinguished.

Per MEREDITH, C.J.O.:—It was not an unreasonable inference from the provisions in the specifications that the plaintiffs should have the right to the stone. The statement in Halsbury's Laws of England, vol. 3, p. 187, that "the builder, in the absence of express stipulation to the contrary, has a general right to dig the foundation of the building and to convert to his own use the materials dug out, provided that they are ordinary materials," should be adopted as the law.

The defendants claimed \$600 as an allowance against the contract price because the plaintiffs had not put in concrete footings, which were required by the contract. A firm bottom of rock was struck, and that was levelled so as to answer the purpose of the footings. The contract required that the footings should be sunk to "hard bearing bottoms, and in cases where sloping rock beds are encountered the same must be levelled." The trial Judge's view was that this allowed an alternative method of performing the contract, and that the expense of doing what was done might fairly be set off against the suggested saving of cost:—

Held, that the trial Judge's finding could not be reversed.

Held, also, that the defendants should have been allowed the costs of their counterclaim, upon which they recovered \$178.45, on the District Court scale: the conversion of the stone was a tort, and the defendants did not waive it by adopting as the measure of their damages the amount for which it was sold.

Judgment of BRITTON, J., varied.

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THE plaintiffs contracted with the defendants to erect a school building for \$46,300. The plaintiffs' claim in this action was for a balance alleged to be due under the contract for work done, for extras, and for damages caused by the stoppage of the work for a time by reason of the alleged non-performance by the defendants of their part of the contract. The defendants counterclaimed to recover the value of stone taken from their land and sold without their consent.

The action and counterclaim were tried by BRITTON, J., without a jury, at Sault Ste. Marie.

J. E. Irving, for the plaintiffs.

P. T. Rowland, for the defendants.

July 3, 1915. BRITTON, J.:—The plaintiffs are contractors doing business at Sault Ste. Marie, and they had a contract with the defendants for the erection of a large public school building; the contract price being \$46,300. There were some extras, but comparatively a small amount, considering the amount expended.

The plaintiffs' claim is for balance upon contract price, for extras, and for damages caused by stoppage, for a time, of the work, owing to alleged non-performance by the defendants of their part of the contract.

The defendants deny liability for some of the items charged, allege a short credit by the plaintiffs for work omitted by reason of changes as the work progressed; and they put in a counterclaim for stone taken from the defendants' land and sold without the consent of the defendants. These claims will be dealt with item by item as put forward by the respective parties.

Although the defendants contended that some of the matters in controversy were wholly for the architects, no objection was taken to my jurisdiction to try the case; and the case was fully tried out.

The work was done under the supervision of the defendants' architects, Moran & McPhail, who had prepared plans and specifications and detailed drawings. The plaintiffs tendered for the work, and their tender was accepted. The tender and acceptance of it—the specifications being made part of the contract—would in themselves make a complete contract between the parties.

There was, however, a formal contract drawn up. It was called "Architects' Contract," drawn up in duplicate, and signed by the plaintiffs—one copy dated the 1st April, 1912, and one dated the 1st September, 1912. It was never signed or sealed by the defendants, nor was one copy of it, as signed by the plaintiffs, delivered to the plaintiffs; but the plaintiffs commenced and continued the work as if contract signed, sealed, and delivered. The contract has been executed. The plaintiffs contend that they did the work in good faith, assuming that the "Architects' Contract" was the same as embodied in the plans and specifications; but, if any difference, they decline to be bound by the "Architects' Contract," so far as there may be any difference between the real contract and the one written out.

The plaintiffs should, before signing, have satisfied themselves that the "Architects' Contract" was right, and they must now be bound by what they have signed except where differing from specifications. The specifications may be looked at as an aid to interpreting the "Architects' Contract." If they differ from the printed form of contract, the specifications should govern.

The contract price is admitted to be.....	\$46,300.00
Extras, or rather extra contract work, are	
admitted to the extent of.....	792.00
<hr/>	
Making.....	\$47,092.00
Payments on account are admitted to the	
extent of.....	46,530.33
<hr/>	
Balance.....	\$561.67

The plaintiffs claim extras under account of small items making in all \$77.42. The defendants admit that all of these were done, but dispute the amount for changing wood lath to metal lath in Kindergarten room, charged at \$56.47. They admit this at \$40 and dispute \$16.47. The matter is a small one. Upon the evidence, the plaintiffs are entitled to that \$56.47, so there should be a debit to the defendants of the whole of the claim of \$77.42, making a total of \$639.09, as claimed by the plaintiffs.

The \$56.47 was paid in good faith by the plaintiffs—no pretence that the plaintiffs—or the person doing the work—were

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dealing unjustly. The fact that the amount was paid is no reason why the plaintiffs should get the allowance; but, on the other hand, when no wrong is intended, the full payment of that amount is as good evidence of value as is the statement of another that he would have done the work for \$16.47 less. The plaintiffs did not know this.

The next three sums claimed by the plaintiffs are claims because of and resulting from stoppage of work for a time, so that the plaintiffs were compelled to work at a later season, and so lost these moneys by the increase in wages and cost of materials.

Increase in carpenter work.....	\$ 77.84
Cost of lumber.....	58.41
Cost of glass.....	253.87
	<hr/>
	\$390.12

The plaintiffs lost money, and perhaps to the full extent claimed; but I am unable, upon the evidence, to find the defendants responsible therefor. The plaintiffs gave no specific notice of their intention. The defendants did not order a stoppage either all or in part. Without any analysis of or further reference to the evidence upon that point, I can only say that it does not warrant my finding in the plaintiffs' favour.

The next item is that of payment to William Don as watchman. The measure of damages in case of liability for this would not be the wages of a watchman. If the defendants are liable, single bond doors or reasonable cost for closing up would be more like it. But, looking at the contract and specifications, it will be found that all structural hardware to be used on the work was to be furnished by the contractors. It was stated and not denied that the necessity for a watchman arose because they had not furnished the hardware. A matter of that kind could and should have been adjusted by a few minutes' conversation between one of the plaintiffs and the architects. The liability for the wages of the watchman has not been established, and the plaintiffs cannot recover for the \$57.

The next item of \$161.82 must share the same fate. The specifications say that where for any cause the work is suspended the contractor shall protect the work. To allow this item, the

evidence must be satisfactory that the stoppage in the work was caused by the defendants; there is not sufficient evidence to warrant that conclusion. This item must be disallowed.

The next item is a small one of only \$48.39 for interest on delayed progress certificates. This was, upon the argument, admitted. The \$48.39 will be allowed to the plaintiffs.

If there was nothing further in the case, the defendants would owe to the plaintiffs the sum of \$687.48, for which the plaintiffs will have judgment; but the defendants counterclaim for four items: (1) that the plaintiffs should make good to the defendants for the saving to the plaintiffs in not putting in concrete footings to the walls of the school building. The saving is estimated at \$600. The onus is upon the defendants to shew that they are entitled to have that amount deducted from the plaintiffs' contract price. They have not satisfied the onus; but, on the contrary, it is clearly established that the plaintiffs are not liable for that sum or any sum in regard to that saving. This contract was a lump sum for the whole building. It is true that the plaintiffs were required to price out for the different trades; that was, properly enough, asked for by the architects, to enable them to compare it with their own estimate, having agreed as to which tenders should be accepted; but the plaintiffs took their own risk, as did the defendants, as to whether the plaintiffs' estimates for material and labour were correct or not. The plaintiffs found a rock foundation, a firm foundation, and so did not require the concrete footings. It seems to me no argument to say that the architects could compel the plaintiffs to put in a concrete foundation instead of using the better rock foundation. Suppose the plaintiffs found quick-sand, so that the concrete foundations would have cost double the amount estimated, would the defendants have allowed for this extra cost? They certainly would not, and they could not be compelled to do so. The specifications appear to me to settle this point beyond reasonable controversy under the head of "excavations:" "All excavating for wall footings to be sunk to hard bearing bottoms, and in cases where sloping rock beds are encountered, the same must be levelled"—levelled, of course, in lieu of concrete footings.

A question arose about this item, as the work progressed, between the plaintiffs and the architects. The architects put in

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a mild or qualified claim. The plaintiffs refused to recognise it. The work went on, the architects certified, and no more was heard of it until after disputes about other matters.

A. C. McLeod, one of the plaintiffs, who gave evidence at the trial, appeared to be a fair and candid witness. He said that, although there was a saving in expense of walls and wall footings in finding a rock foundation so near to the surface, there was to some extent a corresponding loss in having a much larger quantity of rock excavation for the lower rooms of the building.

This omission of the footings was not such a change as to addition to or reduction of cost as was provided for in the specifications—no change such as increasing or reducing size or number of rooms or storeys or anything in the structure. The plaintiffs should not be charged with this item.

As to the stone taken from the defendants' land in excavating for the building, that was the property of the defendants. The plaintiffs would become entitled to it by contract, express or implied. Such a contract might be established by custom or usage, but such would have to be established as known to the defendants or notorious in the place where the work was being done. No such evidence was given.

The defendants wanted the stone; the architects claimed it for the defendants; so the plaintiffs must pay. The proof is only by admissions of the plaintiffs, and is to the extent of—

177 loads at 85 cents.....	\$150.45
22 " " \$1.00.....	22.00
	<hr/>
	\$172.45

The sum of \$50 is claimed by reason of alleged reduction in cost of dealing with the wing of the old building. The original plan was to use the space occupied by the wing for part of the new building. The plan was changed, and so the wing was not torn down; and the defendants say that the plaintiffs could do the work at less net cost; and, as there would have been a loss anyway in tearing down the wing, the plaintiffs would have lost less by \$50 than if the original plan had been adhered to.

That has not been made out. By the specifications the materials, except radiators and piping, were to belong to the

contractors. It cannot be told whether the plaintiffs would have made or lost by not getting the materials. Then, had the wing been torn down and the new building in part been placed upon the site of the wing, the plaintiffs could and would have had the benefit of the cellar—or excavated part of the old—for the new. It has not been proved that the plaintiffs saved anything, even if this alteration was one within the meaning of the specifications that the plaintiffs were bound to have dealt with, as to profit or loss.

By this change of the front of the new building the whole scheme was changed, and the defendants present no material to shew the architects' computations by which the plaintiffs are sought to be made liable. The defendants' counsel, in his argument in writing, stated that it is now for the Court; and, that being so, my decision is that the plaintiffs are not liable for that item.

The item for not taking proper care of the lock, by which there was a loss to the defendants of \$15, has not been satisfactorily proved. If the damage to the lock or other hardware happened after it was put in place by the plaintiffs, they would not be liable unless through their negligence or wilful act. It is common knowledge that the more expensive locks will sometimes, without apparent cause, get out of working order. Whether that was so or not in the present case I do not know; but, upon the evidence, I am not able to find the plaintiffs liable.

The remaining item is neglect to paint the name over the door the same colour as other painted work. This is a very small matter; but the plaintiffs did not have that work done. The cost, charged at \$6, was not objected to, so that will be allowed to the defendants on their counterclaim.

Speaking of this whole case only from the evidence, it seems to me regrettable that litigation was necessary. The work was well done, with comparatively little friction. The only complaint as work progressed arose out of the plaintiffs' delay, by which, no doubt, the plaintiffs lost more than the defendants.

The result of my findings is, that there will be judgment for the plaintiffs for \$687.48, made up as follows:—

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Britton, J.	As above.....	\$ 639.09
1915		48.39
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SAULT		\$ 687.48
STE. MARIE	and judgment for the defendants (plaintiffs in counterclaim) for	
PUBLIC	\$178.45, made up:—	
SCHOOL	Stone.....	\$ 172.45
BOARD.	Painting.....	6.00
		\$ 178.45

Each judgment will be with costs, on the scale of the Supreme Court of Ontario.

The defendants appealed from the judgment of BRITTON, J., and the plaintiffs cross-appealed.

March 1. The appeal and cross-appeal were heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, J.J.A.

H. S. White, for the defendants, argued that there was no express permission to the plaintiffs to remove the excavated material. Nor could such a direction be implied: *Robinson v. Milne* (1884), 53 L.J. Ch. 1070; *Elwes v. Brigg Gas Co.* (1886), 33 Ch. D. 562; *Long Island Contracting and Supply Co. v. City of New York* (1912), 204 N.Y. 73. The defendants should be allowed the \$600 as an allowance against the contract price due to the absence of concrete footings. The defendants should be allowed the costs of their counterclaim.

A. W. Anglin, K.C., for the plaintiffs, contended that the plaintiffs were entitled to remove the material from the excavation. He referred to Halsbury's Laws of England, vol. 3, p. 187.

White, in reply.

April 3. HODGINS, J.A.:—Both parties appeal from the judgment of Britton, J., on various items. These were all disposed of at the hearing adversely to the party appealing, except three. These were: (1) (plaintiffs' appeal), \$172, value of stone removed by the plaintiffs, but allowed to the defendants as belonging to them, though taken out by the plaintiffs when they

were excavating for the foundation and sold as being their own property; (2) (defendants' appeal), \$600, claimed by the defendants as an allowance against the contract price due to the absence of concrete footings. These footings were not put in, as a firm bottom of rock was struck, which was levelled instead; (3) (defendants' appeal, by leave), the costs of the defendants' counterclaim, which were not allowed, their demand being treated as a matter of set-off.

As to (1), there is no custom or usage proved, and there is nothing in the evidence nor in the contract or specifications which throws much light on this matter. By the specifications the contractors are to keep trimmed up in piles all materials delivered to the work "and all refuse, rubbish, and other materials not removed." They are also to "excavate all cellars and basements, walls . . . to full depths etc. If blasting is found necessary for the removal of rock the same must be done under their personal superintendence . . ." "The earth from all excavations shall be roughly levelled where directed over school property."

These provisions give little assistance in determining the intention of the parties. The earth is certainly to remain the property of the owner of the soil, and the only other provision is the ambiguous one first quoted in reference to piling on the ground of "other materials not removed."

In Halsbury's Laws of England, vol. 3, p. 187, the law is thus stated: "The builder, in the absence of express stipulation to the contrary, has a general right to dig the foundation of the building and to convert to his own use the materials dug out, provided that they are ordinary materials and not such things as antiquities etc."

In the Cyclopædia of Law and Procedure, vol. 6, p. 53, it is said that "a contract to excavate land for the erection of a building thereon does not imply that the title to valuable material removed in performing the contract is transferred to the builder."

The English statement is founded upon two cases of building leases. The earlier of these is *Robinson v. Milne*, 53 L.J. Ch. 1070. In it North, J., expresses his own opinion (p. 1072) that "the right to build carries with it the right to dig the necessary foundations and convert the materials dug out;" but he limits this to the case of some definite building to be erected.

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In *Elwes v. Brigg Gas Co.*, 33 Ch. D. 562, Chitty, J. (p. 569), considers that the approval of plans for a wall and gasometer, which the lessees were to erect under the lease, amounted to a license to make the excavations; and that, in the circumstances, there being no provision as to the ownership of the soil excavated, permission to dispose of it ought to be implied. The circumstances mentioned by him were the depth of the excavation and the unlikelihood that the quantity of soil taken out was to be piled upon other parts of the small plot of land.

This last decision, or opinion, is more in line with the principle indicated in the judgment in *Long Island Contracting and Supply Co. v. City of New York*, 204 N.Y. 73, where the Court of Appeals considered that the requirement that the contractor should remove the surplus earth, with no reservation of title to the owner, implied that the contractor could do as he liked with it. The earlier case of *Jones v. Wick* (1894), 62 N.Y. St. Repr. 526, is decided practically on the same principle, that intent by the owner to abandon must be shewn.

There is here no express permission or direction to the contractor to remove what he excavated, and there are two provisions looking somewhat the other way. The earth is to be spread on the owner's land, and the other material not removed is to be piled on the ground. It is sufficient, however, in order to defeat the contractors' claim, if there is nothing from which a reasonable implication might arise that conversion of the shale was authorized. I do not find anything in the circumstances which would warrant such an implication. It is always easy to provide in the contract for the ownership of excavated material; and, where this is not done, and no abandonment of it by the owner can fairly be implied, it seems reasonable to leave the title where it belonged.

The appeal on this ground should be dismissed.

As to No. 2, the contract requires that the footings should be sunk to "hard bearing bottoms, and in cases where sloping rock beds are encountered the same must be levelled." The view of the learned trial Judge is, that this allows an alternative method of performing the contract, and that the expense of doing what was done might fairly be set off against the suggested saving of cost. I do not see how this can be reversed. The admission that the saving by reason of not laying concrete might reasonably be

stated at \$600 is qualified more than once by claims for additional expense owing to the cost of cutting the rock down to the requisite depth.

I think the appeal on this ground likewise fails.

(3) As to the costs of the counterclaim; the defendants should have been allowed these, on the District Court scale, as the conversion of the stone was a tort, and the defendants do not waive it by adopting as the measure of their damages the amount for which it was sold. The price was good evidence of their damage.

As to the costs of the appeals, each side should bear its own. The judgment will stand, save as varied as to the costs of the defendants' counterclaim.

MACLAREN and MAGEE, JJ.A., concurred.

MEREDITH, C.J.O.:—I agree with the opinion of my brother Hodgins as to the disposition which should be made of the appeal as to the claim for a deduction of \$600 from the price agreed to be paid for the work because concrete footings were not put in by the respondents.

I am unable to agree with his conclusion as to the counterclaim for the value of the shale taken out in making the excavation for the building.

In considering what meaning should be given to the provision of the specifications as to keeping trimmed up in piles all materials delivered to the work and all refuse, rubbish, and other materials not removed, to which my brother Hodgins refers, it is necessary to look at some other provisions of the specifications. By one of them the contractors are required promptly to remove all materials rejected and all rubbish; and, in view of these provisions, the meaning of the words which require the trimming up in piles, except in so far as they refer to materials delivered to the work, was to require the contractors to trim up in piles the rubbish and rejected materials pending their removal. That this must be what is meant is, I think, manifest. The contractor had no right to leave the rejected materials or the rubbish; all of these they were bound to remove; but it was no doubt recognised that, although they were bound to remove them promptly, some time would elapse before that would be done, and the provision as to

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piling them up was intended to provide for what the contractors should be bound to do pending their removal. Then, too, "materials" cannot have been intended to apply to what should be taken out in making the excavation.

The word is used twice in the provision as to piling, and again in the provision as to removing rejected materials; and, in my opinion, it was always used in the same sense, i.e., as meaning materials brought on the ground for use in the construction of the building. Besides this, there is a clause which deals with what is taken out in making the excavation, and it provides that "the earth from all excavations shall be roughly levelled where directed over school property." If, however, the word "materials," as used in the piling provision, includes materials dug out in the course of excavating, the case for the contractors is, I think, strengthened. "Removed," as used in that provision, means removed from the premises on which the building was to be erected; and the fair inference from this would be that the contractors were to be entitled, if they chose to do so, to remove from the premises what was dug in the course of excavating, except what they were required, by the provision I have quoted, to level roughly over the school property.

Assuming, however, that the provision as to piling does not apply to the materials dug out in the course of excavating, the proper inference to be drawn from the specifications is, I think, that the contractors were to be entitled to all that was dug out in the course of excavating, except the earth, which they were to level roughly. *Ex hypothesi*, there is no provision for piling it. It is not included in the provision as to levelling, and it follows that the only thing that the parties could have contemplated was the removal of it by the contractors from the school premises. Every one knew that shale would or might be met with in excavating for the foundations of the building; and, that being present to the minds of the contracting parties and to the School Board's architect, it is significant that, while the specifications provide for what was to be done with the earth, they make no provision as to the disposition to be made of the shale, and it is therefore not an unreasonable inference that it was intended that the contractors should have the right to the shale.

There appears to be a difference between the views of the

English Courts and those of the American Courts as to the right to the spoil where there is no express provision as to what is to be done with it. In the view of the English Courts, it *primâ facie* belongs to the contractor. The American Courts take the opposite view, and hold that in order to entitle the contractor to the spoil it must appear from the terms of the contract that the land-owner intended to abandon it to the contractor. We may, I think, safely adopt the view of the English Courts and the statement of the law in the third volume of Halsbury's Laws of England, p. 187, which my brother Hodgins quotes.

I would, for these reasons, allow the appeal of the plaintiffs as to the stone, with costs.

Appeal dismissed (except as to the costs of the counterclaim);
MEREDITH, C.J.O., *dissenting upon one branch.*

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[APPELLATE DIVISION.]

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Constitutional Law—Marriage Act, R.S.O. 1914, ch. 148, sec. 36—Ultra Vires—British North America Act, 1867, secs. 91(26), 92(12)—Solemnisation of Marriage—Jurisdiction of Supreme Court of Ontario—Action for Declaration of Invalidity of Marriage—Effect of sec. 15 of Marriage Act—Consent—Directory Provision—Restriction on Right to Marry.

Everything which is included in the solemnisation of marriage is, by sec. 92 (12) of the British North America Act, excepted from the exclusive jurisdiction to legislate as to marriage which, by sec. 91(26), is vested in the Parliament of Canada.

In re Marriage Legislation of Canada, [1912] A.C. 880, followed.

The Ontario Marriage Act, R.S.O. 1914, ch. 148, does not make the consent required by sec. 15 a condition precedent to the formation of a valid marriage—the provisions of sec. 15 are merely directory.

Rex v. Inhabitants of Birmingham (1828), 8 B. & C. 29, followed.

Semle, apart from authority, that the provision requiring consent is *ultra vires*, as in effect a restriction upon the right to marry of a person under the age of 18 years.

And *held*, that sec. 36 of the Marriage Act, which purports to give the Supreme Court of Ontario power to declare and adjudge that a valid marriage was not effected or entered into, where one of the parties was under the age of 18 years, and the consent required by sec. 15 was not given, is *ultra vires* of the Ontario Legislature.

Opinion of MEREDITH, C.J.C.P., 34 O.L.R. 121, approved.

ACTION for a declaration that a valid marriage was not effected or entered into between the parties, the plaintiff, Ruth M. Pep-

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piatt, being, at the time she went through a form of marriage with the defendant, under the age of 18 years, and without the consent required by the Marriage Act, R.S.O. 1914, ch. 148, sec. 15.

Section 136 of the Act provides that the Supreme Court of Ontario shall have power, in certain circumstances, to declare and adjudge that a valid marriage was not effected or entered into between persons who have gone through a form of marriage.

The trial Judge, MEREDITH, C.J.C.P., was of opinion that sec. 36 was *ultra vires* of the Ontario Legislature, but referred the action to a Divisional Court of the Appellate Division: 34 O.L.R. 121.

November 10, 1915. The case was heard by MEREDITH, C.J.O., GARROW, MACLAREN, MAGEE, and HODGINS, JJ.A.

George S. Kerr, K.C., for the plaintiff.

The defendant was not represented.

Edward Bayly, K.C., for the Attorney-General for Ontario. The argument, so far as the Attorney-General is concerned, is confined to the question whether sec. 36 of the Marriage Act, R.S.O. 1914, ch. 148, is *intra vires*; and it is submitted that it is *intra vires*, for the following reasons. Under the British North America Act, sec. 92, sub-head 12, exclusive jurisdiction to make laws upon the subject of solemnisation of marriage in the Province is committed to the Provincial Legislature, whereas the exclusive legislative authority upon the subject of marriage and divorce (apart from solemnisation of marriage within a Province) is given, by sec. 91, sub-head 26, to the Dominion Parliament. While it is clear that everything connected with marriage and divorce which does not come under the head of solemnisation of marriage in the Province must be within Dominion jurisdiction, yet sec. 36 deals with the subject of solemnisation exclusively, and undertakes to say that under certain conditions the failure to obtain the consent which is required by the Marriage Act, sec. 15, and which is part of the ceremony of solemnisation (*Sottomayor v. De Barros* (1877), 3 P.D. 1), shall, if so declared by the Supreme Court, render the ceremony invalid. Would there be any doubt, if the Act had in express terms provided that the absence of the required consent should invalidate the marriage, that this suppositional legislation (being directed to the solemnisation of marriage) would be *intra vires*? The present legislation does not go so far as this,

but enacts that, under the conditions set out in sec. 36, the Supreme Court may declare a marriage *invalid*. In other words, the Legislature, instead of exercising its full power and declaring all ceremonies of marriage which lack the required consent ineffectual, has simply picked out a limited class of cases, and has authorised the Court to make the declaration. This exercise of power, instead of being wider than an enactment invalidating such ceremonies of marriage, is in reality narrower; and, therefore, from a constitutional standpoint as clearly *intra vires* as the wider enactment above suggested would be. The learned trial Judge has in his judgment failed, it is submitted, to observe the vital distinction between nullity of marriage and divorce. Nullity of marriage implies that there is no marriage: divorce recognises the marriage, but breaks the bond. The Roman Catholic Church does not recognise divorce, yet recognises fifteen diriment or nullifying impediments. See Imperial Blue Book Minutes taken before the Royal Commission on Divorce—evidence of Monseigneur Moyes, vol. 2, p. 426. The legislation is treated by the learned Chief Justice of the Common Pleas as if it were dealing with capacity or impediments (which it is not) or the subject of divorce (which it is not), instead of the subject of solemnisation, which it clearly is. In Holmsted's "Matrimonial Jurisdiction," pp. 15 and 16, the author criticises this legislation, but fails to notice that the Legislature, while having the undoubted right to declare that there is no marriage, where consent is wanting, simply chooses to deal in sec. 36 with a certain class; and whether they really are *de facto* marriages, as Mr. Holmsted assumes, is not here a matter of concern. Reference may be made to an article in 35 Canadian Law Times at p. 505; Clement's Law of the Canadian Constitution, 3rd ed., pp. 557, 561; *In re Marriage Laws* (1912), 46 S.C.R. 132; *In re Marriage Legislation in Canada*, [1912] A.C. 880.

The Attorney-General for Canada was not represented.

April 3. The judgment of the Court was delivered by MEREDITH, C.J.O.:—This is an action which came on for trial before the Chief Justice of the Common Pleas, sitting without a jury, at Hamilton, on the 9th day of April, 1915.

The learned Chief Justice, after hearing the evidence and the arguments of counsel, believing himself bound by a decision of a

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Judge of co-ordinate authority, which in his opinion was wrong, to hold what he considered not to be the law, to be the law, referred the case to a Divisional Court of the Appellate Division, under the provisions of sub-sec. 3 of sec. 32 of the Judicature Act (R.S.O. 1914, ch. 56).

The reasons of the Chief Justice for his decision are reported in (1915) 34 O.L.R. 121.

It may be open to question whether the circumstances which existed warranted a reference to a Divisional Court, but no objection was made by any of the parties to our treating the case as having been properly referred; and, in any case, it would be proper for us to deal with the matter as if it were an appeal by the plaintiff from a judgment of the trial Judge dismissing her action.

The sole question to be determined is, whether or not the provisions of sec. 36 of the Marriage Act, R.S.O. 1914, ch. 148, are *intra vires* the Legislature of Ontario.

The provisions of sec. 36 are as follows:—

“36.—(1) Where a form of marriage has been or is gone through between persons either of whom is under the age of 18 years without the consent required by section 15, in the case of a license, or where, without a similar consent in fact, such form of marriage has been or is gone through between such persons after a proclamation of their intention to intermarry, the Supreme Court, notwithstanding that a license or certificate was granted or that such proclamation was made and that the ceremony was performed by a person authorised by law to solemnise marriage, shall have jurisdiction and power in an action brought by either party, who was at the time of the ceremony under the age of 18 years, to declare and adjudge that a valid marriage was not effected or entered into;

“Provided that such persons have not, after the ceremony, cohabited and lived together as man and wife, and that the action is brought before the person bringing it has attained the age of 19 years.

“(2) Nothing in this section shall affect the excepted cases mentioned in section 16 or apply where, after the ceremony, there has occurred that which, if a valid marriage had taken place, would have been a consummation thereof.

“(3) The Supreme Court shall not be bound to grant relief in

the cases provided for by this section where carnal intercourse has taken place between the parties before the ceremony."

Section 37 deals with the procedure in actions brought under sec. 36 and stands or falls with it.

By sec. 91 (26) of the British North America Act, exclusive authority to make laws in relation to "marriage and divorce" is vested in the Parliament of Canada; and, by sec. 92 (12) of the same Act, exclusive authority to make laws in relation to "the solemnisation of marriage in the Province" is vested in the Provincial Legislatures.

The question as to the extent of the exclusive authority to legislate as to these matters of the Parliament of Canada and of the Provincial Legislature respectively was the subject of controversy for many years. It was, however, finally settled by the decision of the Judicial Committee of the Privy Council in *In re Marriage Legislation in Canada*, [1912] A.C. 880, that everything which is included in the solemnisation of marriage is excepted from the exclusive jurisdiction to legislate as to marriage which is vested in the Parliament of Canada.

In stating the opinion of the Board, the Lord Chancellor said: "The real controversy between the parties was as to whether all questions relating to the validity of the contract of marriage, including the conditions of that validity, were within the exclusive jurisdiction conferred on the Dominion Parliament by sec. 91. If this is so, then the provincial power extends only to the directory regulation of the formalities by which the contract is to be authenticated, and does not extend to any question of validity. This was the view contended for by one set of the learned counsel who argued the case at their Lordships' Bar. The other learned counsel contended that the power conferred by sec. 92 to deal with the solemnisation of marriage within a Province had cut down the effect of the words in sec. 91, and effected a distribution of powers under which the Legislature of the Province had the exclusive capacity to determine by whom the marriage ceremony might be performed, and to make the officiation of the proper person a condition of the validity of the marriage" (p. 886).

The conclusion to which the Board came was that "the provision in sec. 92 conferring on the Provincial Legislature the exclusive power to make laws relating to the solemnisation of marriage

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in the Province operates by way of exception to the powers conferred as regards marriage by sec. 91, and enables the Provincial Legislature to enact conditions as to solemnisation which may affect the validity of the contract . . . *Primâ facie* these words" (i.e., "solemnisation of marriage") "appear to their Lordships to import that the whole of what solemnisation ordinarily meant in the systems of law of the Provinces of Canada at the time of Confederation is intended to come within them, including conditions which affect validity. There is no greater difficulty in putting on the language of the statute this construction than there is in putting on it the alternative construction contended for. Both readings of the provision in sec. 92 are in the nature of limitations of the effect of the words of sec. 91, and there is, in their Lordships' opinion, no reason why what they consider to be the natural construction of the words 'solemnisation of marriage,' having regard to the law existing in Canada when the British North America Act was passed, should not prevail" (p. 887).

In view of this decision, two questions only have to be considered in order to determine whether or not sec. 36 is *ultra vires* the Provincial Legislature:—

1. Does the Marriage Act make the consent required by its 15th section a condition precedent to the formation of a valid marriage?

2. And, if that question be answered in the affirmative, the further question, Are the provisions of sec. 15 *intra vires* the Provincial Legislature as being part of what is comprehended in the words "solemnisation of marriage," as those words have been interpreted in the *Marriage* case?

In my opinion, the answer to the first of these questions must be in the negative. What sec. 15 provides is, I think, in the nature of a direction to the issuer of marriage licenses. The affidavit which one of the contracting parties is required by sec. 19 (1) to make, before a license or certificate is issued, must state, among other things:—

"(d) the age of the deponent, and that the other contracting party is of the full age of 18 years, or the age of such other contracting party, if under the age of 18 years, as the case may be;"

"(f) the facts necessary to enable the issuer or deputy-issuer to judge whether or not the required consent has been duly given

in the case of any party under the age of 18 years, or whether or not such consent is necessary."

Then by sec. 21 it is provided that if "the person having authority to issue the license or certificate has personal knowledge that the facts are not as required by section 15, he shall not issue the license or certificate; and if he has reason to believe or suspect that the facts are not as so required, he shall, before issuing the license or certificate, require further evidence to his satisfaction in addition to the affidavit prescribed by section 19."

Reading sec. 15 in the light of the provisions of secs. 19 and 21, the words "shall be required before," in sec. 15, mean, I think, shall be required by the person who issues the license or by the person by whom the proclamation of the intention of the parties to intermarry is made. If it were otherwise, and compliance with the requirement of sec. 15 were essential to the validity of the marriage, it would follow that, although both of the contracting parties honestly believed and had reason to believe that each of them had attained the full age of 18 years, when in fact they or one of them had not, their marriage would be invalid. Good faith has nothing to do with the matter; if the fact exists, that consequence follows. It may happen sometimes, perhaps often, that persons proposing to marry do not know their own ages, and oftener still do not know the age of the other party to the proposed marriage; and it is impossible for me to believe that any Legislature would have enacted a law which would render invalid a marriage otherwise valid because both of the parties or one of them had not attained the age of 18 years, and the required consent had not been obtained, if it was honestly believed that that age had been attained by both of them.

Other instances of what I think are directory provisions are found in sec. 5. Surely it cannot have been intended that, if a marriage takes place more than three months after proclamation of the intention to marry or after the date of the license or certificate, or if the marriage is solemnised between ten o'clock in the afternoon and six o'clock before noon, or without the presence of two or more witnesses, or if the witnesses fail to affix their names as witnesses to the record in the register, or if the marriage is solemnised by a clergyman who was the issuer of the license or certificate, the marriage is invalid. Of these requirements of the

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law the contracting parties may be in blissful ignorance, and it would be a shocking thing if, where they had not been complied with, the persons who had married and had afterwards cohabited in the belief that they were man and wife were to be held to be living in adultery and the children of the marriage to be illegitimate.

It was argued by Mr. Bayly that sec. 36, when read in connection with sec. 15, shews that the intention of the Legislature was to make compliance with the provisions of sec. 15 essential to the formation of a valid marriage. I do not agree with that contention. If anything, a contrary intention is indicated. The jurisdiction which sec. 36 assumes to confer on the Supreme Court is, not to declare and adjudge any marriage which has taken place without the consent required by sec. 15 not to be a valid marriage, but so to declare and adjudge only in an action by a party who, at the time the ceremony of marriage was gone through, was under the age of 18 years, and then only if the parties have not after the ceremony cohabited and lived together as man and wife, and if the action is brought before the person bringing it has attained the age of 19 years.

There would have been more force in the argument if sec. 36 had given jurisdiction to declare and adjudge that any marriage that had been solemnised without the required consent was not a valid marriage; but, even if that had been the provision of the section, I do not think the argument would have been entitled to prevail. If marriages without the required consent are, as is contended they are, invalid, it was unnecessary to confer jurisdiction to declare and adjudge them to be invalid, as the Supreme Court had that jurisdiction vested in it by the Judicature Act. Then, if the section is *intra vires*, what is the position of parties who have married without the required consent, in the cases that are excluded from the operation of the section?

If it is intended that compliance with the requirements of the marriage law as to matters prior to the performance of the marriage ceremony shall be essential to the formation of a valid marriage, it is, I think, incumbent on the Legislature to say so in plain and unequivocal language; and that, in my opinion, in the case with which I am dealing, it has not done.

The provisions of R.S.O. 1914, ch. 148, sec. 15 (1), and sec.

19 (1) (f), as to consent, are substantially the same as those of the Imperial Act 4 Geo. IV. ch. 76, sec. 16, except that the consent is required in the case of a contracting party who is under the age of 21 years.

The effect of sec. 16 of the Imperial Act was considered by the Court of King's Bench in *Rex v. Inhabitants of Birmingham* (1828), 8 B. & C. 29, and it was held that its provisions were directory only. Delivering the judgment of the Court, Lord Tenterden, C.J., pointed out that the language of the section "is merely to require consent, it does not proceed to make the marriage void, if solemnised without consent." Other provisions of the Act, which are not to be found in the Provincial Act, were referred to in support of the conclusion to which the Court came; but I have no doubt that the result would have been the same if those provisions had not been contained in the Act, for in making reference to them Lord Tenterden begins by saying, "If there were any doubt upon the construction of that section" (i.e., sec. 16), "it would be removed . . ."

The law had at one time been otherwise. The provision of the Act 26 Geo. II. ch. 33, sec. 11, as to consent, was, that if a marriage was solemnised by license without the consent the marriage should be "absolutely null and void to all intents and purposes."

Section 11 was repealed by 3 Geo. IV. ch. 75, the preamble of which, after reciting the section, recites that the Act was for the remedy of the great evils and injustice which had arisen from the provisions of the section, and a new section (8) was enacted, containing provisions very similar to those of the Provincial Act which are contained in sec. 15 (1) and sec. 19 (1) (f).

Section 8 was in turn repealed by 4 Geo. IV. ch. 76, and there was substituted for it the section of the Act which was under consideration in *Rex v. Inhabitants of Birmingham*.

It is not, I think, an unreasonable inference that the draftsman of the Act 37 Vict. ch. 6, the provisions of which, with some changes and additions, now form R.S.O. 1914, ch. 148, had before him these statutes and the *Birmingham* case, and deliberately refrained from embodying in the Act a provision like that contained in sec. 11 of 26 Geo. II. ch. 33. The then Attorney-General for the Province, the late Sir Oliver Mowat, an able and most careful lawyer, was, I have no doubt, the draftsman of the Act, as the bill was introduced into the Legislative Assembly by him.

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As I have come to the conclusion that the answer to the first question must be in the negative, it is unnecessary to answer the second question.

I should have thought, apart from authority, that the provision requiring consent is *ultra vires* a Provincial Legislature. It is in effect a restriction upon the right of a person under the age of 18 years to marry, and therefore a restriction upon his personal capacity to contract marriage; and I should have thought that the provision, therefore, deals with a matter which does not fall within sec. 92 (12) as being part of what is included in "solemnisation of marriage," but is one as to which the Parliament of Canada alone has authority to legislate. It may be, however, that we would be bound by decided cases to hold otherwise.

I would dismiss the action without costs.

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[APPELLATE DIVISION.]

REX v. BAUGH.

Criminal Law—Conspiracy—Evidence—Opinion of Trial Judge in Civil Action as to Veracity of Accused—Inadmissibility—Reasons for Judgment not Given in Presence of Accused—Cross-examination of Accused—Hearsay Evidence—Res Judicata—Opinion Evidence—Evidence as to Unveracity Based on Single Incident—Judge's Charge—Misdirection—Substantial Wrong or Miscarriage—Criminal Code, sec. 1019—New Trial.

The defendant was tried and convicted upon a charge of conspiring with G. and others to prosecute S. for an alleged offence, knowing S. to be innocent thereof. Before the charge was made, a civil action, to which the defendant and S. were parties, was tried, and the trial Judge, in written reasons for judgment, given when the defendant was not present, expressed an opinion unfavourable to the veracity of the defendant. At the defendant's trial on the criminal charge, he testified on his own behalf; and, on cross-examination by counsel for the Crown (against the objection of the defendant's counsel), the defendant was shewn a report of the written reasons above referred to, and was required to answer questions as to his knowledge of the Judge's remarks. The Judge who presided at the criminal trial, in charging the jury, referred to the defendant's admission as to the opinion of him entertained by the Judge who tried the civil action, and told the jury to consider that, when determining whether the defendant was to be believed as against witnesses who had contradicted him:—

Held (MAGEE, J.A., dissenting), that the passage from the reasons for judgment above mentioned was not admissible in evidence, and the Judge at the criminal trial was wrong in charging the jury in the manner above stated.

Henman v. Lester (1862), 12 C.B.N.S. 776, and *Houstoun v. Marquis of Sligo* (1885), 29 Ch.D. 448, distinguished.

Per MEREDITH, C.J.O., and GARROW and HODGINS, JJ.A.:—What was said by the Judge who tried the civil action was not said in the presence of

the defendant; the reasons for judgment were not evidence of *res judicata*; the effect of allowing the evidence to be given was to admit hearsay evidence; what was done was in substance to admit as evidence the report of the reasons for judgment; and it was not admissible even on the cross-examination of the defendant.

Per MACLAREN, J.A.:—The evidence would have been equally objectionable if the learned Judge whose opinion was quoted had given it as sworn testimony in open court at the criminal trial. It would, at the highest, be opinion evidence on a point on which opinion evidence was not admissible. It would also be evidence as to moral character and unvaracity, based upon a single incident, and on that ground also objectionable.

Per MAGEE, J.A.:—In the circumstances of the case, it was open to the prosecution to shew that the judgment in the civil action had not proceeded upon the absence of certain documents, but that the Court had found upon the fact of the untruthfulness of the defendant's own statements. As to the mode of proving that, it was done from the source to which the defendant himself referred as shewing that the documents had not been referred to; and no objection was taken to the mode of proof, but only to the admissibility of the questions.

Held, also (MAGEE, J.A., dissenting), that it could not be said that no substantial wrong or miscarriage was occasioned by the improper admission of the evidence: Criminal Code, sec. 1019; and there should be a new trial.

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CASE stated by the Senior Judge of the County Court of the County of York, before whom and a jury, at the General Sessions of the Peace for the County of York, the defendant was tried and found "guilty" on a charge of conspiracy—that the defendant did unlawfully conspire with one Gariepy and others to prosecute one Stimson for an alleged offence, knowing Stimson to be innocent thereof, contrary to the Criminal Code.

Only two questions were argued before the Court, viz.: (1) Was the trial Judge right in referring to the judgment of MIDDLETON, J., in a civil action, to which the defendant was a party, in which that learned Judge expressed an opinion as to the veracity of the defendant? (2) Was the passage from the reasons for judgment of MIDDLETON, J., which was given in evidence, and to which the first question related, admissible in evidence?

March 20. The case was heard by MEREDITH, C.J.O., GARROW, MACLAREN, MAGEE, and HODGINS, JJ. A.

I. F. Hellmuth, K.C., and *T. C. Robinette*, K.C., for the defendant, argued, first, that the trial Judge was wrong in referring to the opinion expressed by Middleton, J., in his reasons for judgment in the former civil action, as to the veracity of the defendant: *Allen v. The King* (1911), 44 S.C.R. 331; *Regina v. Britton* (1893), 17 Cox C.C. 627; *Rex v. D'Aoust* (1902), 3 O.L.R. 653, 5 Can. Crim. Cas. 407; *Rex v. Rouse*, [1904] 1 K.B. 184, 20

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Cox C.C. 592; *Campbell's Case* (1912), 8 Cr. App. Cas. 75; *The Queen v. Gibson* (1887), 18 Q.B.D. 537; and, secondly, that the citation from the judgment of Middleton, J., was not admissible in evidence, not only because it was hearsay, but because of its being opinion evidence, and also because it was evidence as to character and credibility, under conditions which precluded it from being used, even if the opinion of a Judge so given could, in any circumstances, be so used—the general rule being that such evidence must be as to general reputation, and not merely as to a particular occasion or fact: *Regina v. Rowton* (1865), 10 Cox C.C. 25; Russell on Crimes and Misdemeanours, 6th ed., vol. 3, pp. 425, 426; *The Queen v. Rogan and Elliott* (1846), 1 Cox C.C. 291; Archbold's Criminal Pleading, 22nd ed., pp. 281-286; Phipson's Law of Evidence, 2nd ed., p. 478; *Henman v. Lester* (1862), 12 C.B. N.S. 776.

J. R. Cartwright, K.C., and *J. B. Clarke*, K.C., for the Attorney-General, contended that the question of character evidence had been opened up by the defendant; and, in these circumstances, the Crown had a right to put in the opinion of Middleton, J.; and there was no reason why the trial Judge should not have referred to it. In support of their contentions they cited Wigmore on Evidence, Can. ed., vol. 2, p. 1112; *Child v. Grace* (1825), 2 C. & P. 193.

April 3. MEREDITH, C.J.O.:—Case stated by the Judge of the County Court of the County of York.

The defendant was tried and convicted at the General Sessions of the Peace for the County of York on a charge of conspiracy.

The conspiracy charged was that the defendant, "at the city of Toronto . . . between the 15th day of May and the 6th day of July, did unlawfully conspire with one Albert Joseph Gariepy and other persons to the informant unknown, to prosecute George Alexander Stimson, of the city of Toronto, investment broker, for an alleged offence, knowing the said George Alexander Stimson to be innocent thereof, contrary to the Criminal Code."

There were other counts in the indictment, but it is not necessary for the determination of the questions we are called upon to answer to say anything further as to them.

The questions submitted for the opinion of the Court are six in number, but only one of them, the fifth, was discussed upon the

argument before us, the contention of the defendant as to the matters to which the other questions relate having been abandoned.

The fifth question is: "(5) Was I right in referring in the manner I did to the judgment of the Honourable Mr. Justice Middleton in which he expressed an opinion as to the veracity of the accused, Edward Levi Baugh?"

It appearing in the course of the argument that the point intended to be raised by the fifth question was not wholly covered by that question, the argument proceeded upon the footing that another question, viz., whether the passage from the reasons for judgment of Mr. Justice Middleton which was given in evidence, and to which the fifth question relates, was admissible in evidence, was before the Court.

In order to understand the nature of the charge, it will be necessary briefly to summarise the main facts appearing in evidence. There was a dispute between the prosecutor Stimson and the defendant in reference to a mining transaction. An action was brought by Stimson against the defendant to recover a large sum of money, which was claimed to be owing by him to Stimson as the result of this transaction. There was a conflict of evidence at the trial. The testimony of Stimson as to matters upon which he relied as entitling him to recover was directly contradicted by the testimony of the defendant. Stimson succeeded in the action, and recovered judgment against the defendant for a large sum. Stimson lives in Toronto and the defendant in Montreal.

After the recovery of the judgment, in order to obtain the fruits of it, it was necessary that proceedings should be taken in the Courts of Quebec to obtain what, as I understand, was a judgment of the Quebec Court for the amount of the judgment that had been recovered in the action brought by Stimson in this Province. Such proceedings were taken by Stimson, and were resisted by the defendant. Criminal proceedings were then instituted in Montreal by the defendant against Stimson, whom he charged with fraud in connection with the recovery of the judgment in Ontario, and it was in respect of these proceedings that the conspiracy was charged. The case for the Crown was that the defendant and Garipey conspired to fabricate and forge

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letters purporting to have been written by Stimson, which, if genuine, would have established the defence of the defendant in the Ontario action, and which the defendant alleged had been fraudulently concealed by Stimson.

Both Stimson and the defendant were examined as witnesses at the trial in the General Sessions, and there was a direct conflict in their testimony. There was also a direct conflict between the testimony of the defendant and that of Gariepy and other Crown witnesses examined.

The evidence to the reception of which objection is taken was elicited in the cross-examination of the defendant. He had been asked as to the result of the action in which judgment was recovered against him, and had answered that it was adverse to him. He was then shewn the Weekly Notes containing a report of the reasons for judgment of Mr. Justice Middleton, and later on he was asked:—

“Q. Do you know that Judge Middleton made this finding in regard to your recollection, ‘I entirely disbelieve Baugh’s account of his ignorance of what had been done?’”

“Q. Do you also know that this is part, ‘There is much in Baugh’s evidence, when analysed with care, to indicate his utter unreliability?’”

“Q. The Judge had specifically stated that he considered you to be a man of utter unreliability?”

These questions were allowed to be put to the defendant, and he was required to answer them, against the strenuous and repeated objection of his counsel that the questions were improper.

In his charge to the jury the learned Judge, referring to this evidence, said: “I was very much pleased to hear Mr. Robinette speak so complimentarily of Mr. Justice Middleton. I corroborate him in every statement as to that. Mr. Justice Middleton is one of our foremost Judges at the present day, and his judgments are respected by every one. You heard what Mr. Baugh admitted as to Mr. Justice Middleton’s idea as to him. That does not exactly say that he is telling an untruth here. It is for you, however, to consider that in connection with the veracity of the parties, to see whether he is reliable or unreliable, whether he is false or true; whether these other men are swearing to what is right. If you accept their evidence, then it is your duty to bring

in a verdict under your oath, according to that evidence, of 'guilty.' If, however, you do not accept their evidence, but believe Baugh as against them all, then you bring him in 'not guilty.'"

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We were not referred to any case, and I have found none, in which the question as to the admissibility of such questions as those which are objected to as being improper has arisen.

In *Henman v. Lester*, 12 C.B.N.S. 776, the defendant was charged with having made a fraudulent representation as to the price which certain seedsmen in London would give for certain seed, whereby the plaintiff was induced to sell for a lower price than he would otherwise have done. The defendant, who appeared as a witness, having in his examination in chief denied the alleged misrepresentation, was asked on cross-examination whether there had not been proceedings against him in the County Court at the suit of one Agutta, in respect of a similar claim, which he had resisted, and upon which he had given evidence; and the jury, notwithstanding, found their verdict for the then plaintiff. It was objected by the defendant's counsel that questions relating to the contents of public judicial proceedings, which must be in writing, could not be asked, but that the record must be produced. The objection was overruled, and the questions were allowed to be put. A verdict having been found for the plaintiff, the defendant moved for a new trial, on the ground of misreception of evidence in permitting him to answer the questions that were put to him as to having had a cause in the County Court and lost it, and as to the question in issue there. The objection was not to the right to make the inquiry as to the matters on which the defendant had been cross-examined. As was said by Willes, J.: "It was hardly disputed that the inquiry was admissible, as going to the credit of the witness; and it is not denied that in point of fact such proceedings did take place in the County Court" (p. 787); but the contention was that "such evidence was inadmissible even for the collateral purpose of testing the witness's credit, without producing, or otherwise formally proving, the record of the proceedings in the County Court" (*ibid.*); and that contention did not prevail.

I think it must be taken as the result of this case that the inquiry was proper, and that it was not necessary to prove the

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facts as to which it was directed by producing or otherwise formally proving the record of the proceedings in the County Court.

Nothing that was said gives any support to the argument of the learned counsel for the Crown, in the case at bar, that it was proper to inquire of the defendant as to the reasons upon which the judgment of my brother Middleton was based. What was done was in substance and effect to put in evidence these reasons as far as they dealt with the credibility of the defendant. He was bound to submit to having his credibility attacked by eliciting from him the fact of the previous trial having taken place, what the issues in the action were, the fact that he and Stimson had been examined as witnesses at the trial, and the result of the trial—but not, in my opinion, the views expressed by the trial Judge as to his credibility.

In *Houstoun v. Marquis of Sligo* (1885), 29 Ch.D. 448, the defence of *res judicata* by a judgment of an Irish Court was set up, and a question arose as to whether the matters which were in controversy in the Irish action were the same as were in issue in the subsequent action. The defendant offered in evidence a verified copy of the transcript of the notes of the shorthand writer who took shorthand notes of the report to the Divisional Court in Ireland of the trial Judge, which contained a *resumé* of the evidence given by the plaintiff in Dublin, and concluded as follows: "I directed a verdict for the plaintiff on the construction of the lease of 1883. I considered there was no evidence that the lease was executed under any mistake, certainly not by Lord Sligo, and in effect directed a verdict against the special defence." And it was held that the report was admissible as evidence of what took place before the trial Judge and what he decided.

I am not aware of any case in which the notes of the trial Judge have been admitted as evidence in another action except for the purpose of ascertaining from what took place at the trial whether the matters in controversy in that action were the same as those in controversy in the subsequent action, and what was decided by the trial Judge.

The matters as to which the questions were allowed in *Henman v. Lester* were all matters within the personal knowledge of the witness. What was said by my brother Middleton in delivering his judgment was not said in the presence of the defendant, and

the effect of allowing evidence of this to be given was to admit hearsay evidence, and what was done was in substance to admit as evidence the report of the reasons for judgment of my brother Middleton; and it was not, in my opinion, admissible even on the cross-examination of the defendant.

It was argued by the learned counsel for the Crown that, if the evidence was improperly admitted, no "substantial wrong or miscarriage was thereby occasioned on the trial;" and the provisions of sec. 1019 of the Criminal Code were invoked; but I am not of that opinion.

The fact that my brother Middleton had discredited the testimony of the defendant in the civil action was emphasised by the trial Judge, as was also the weight that should be attached to the finding of so eminent a Judge.

I am, for these reasons, of opinion that both of the questions submitted must be answered in the negative and a new trial directed.

GARROW, J.A.:—I agree.

MACLAREN, J.A.:—I agree in the result. In my opinion, the evidence objected to should not have been received. I do not think that the objection that it is hearsay evidence places it upon the proper ground. I think it would be equally objectionable if the learned Judge whose remarks are quoted had given them as sworn testimony in open court at the trial of the present case. Even then it would, at the highest, be opinion evidence on a point on which opinion evidence is not admissible. It would also be evidence as to moral character and unverity, based upon a single incident, and on that ground also would be objectionable.

I have some doubt as to whether what was said and done at the trial on this point "occasioned some substantial wrong" to the appellant; but, in view of the opinion of my brethren upon this point, I concur, with some hesitation.

MAGEE, J.A. (dissenting):—The accused Baugh, with one Proctor, had been sued by one Stimson upon a promissory note which had been signed by Proctor for both himself and Baugh.

At the trial in Toronto before Mr. Justice Middleton, Stimson

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had sworn that the defendant had agreed to purchase a mining property from him, and that the note was given on account of the purchase. Baugh had sworn that it was not a purchase but an option to purchase, and denied Proctor's authority. Judgment was given by Mr. Justice Middleton against Baugh upon the note, for a sum exceeding \$30,000, and this was subsequently affirmed on appeal. As Baugh lived in the Province of Quebec, it was necessary for Stimson to sue him there upon the judgment, and he retained legal advisers there for that purpose. Baugh countered by instituting criminal proceedings at Montreal against Stimson, alleging perjury at the trial.

Stimson's letter-books were seized in Toronto, and, when produced, were found to contain press copies of letters purporting to have been written by him which would be inconsistent with his evidence at the trial in Toronto and would support that given by Baugh.

Confronted with this evidence in his own books and with a criminal prosecution in another Province, Stimson was induced to release his judgment, and the criminal proceedings were dropped. The present criminal charge against Baugh is in effect that he had conspired with one Gariepy, before launching the criminal proceedings in Montreal, to have Stimson's letter-books stolen from his office, and forged letters copied at blank pages in spaces found therein or inserted, and then the books returned to the office, so that it would appear that Stimson had concealed the copies of letters and sworn to what was not true—for the Crown wished to prove this charge conclusively; and, though Baugh was sworn on his own behalf and denied his complicity and called other witnesses, the jury found him "guilty;" and the evidence would seem fully to warrant this verdict.

During the trial, the fact of the action on the note and the trial before Middleton, J., were several times referred to without objection, as well as the facts which I have mentioned as to the statements by Stimson and Baugh; and the fact that, despite his statements, the defendant had judgment given against him, and the fact of the criminal proceedings against Stimson and his release of the judgment, were also shewn. While Baugh was giving evidence as a witness on his own behalf, he was asked by his counsel whether he had given any authority for the signing of the

note, and denied having done so, and judgment went against him. Then he was asked by his own counsel whether at the time of the civil trial he was satisfied that everything was produced, to which he replied that he was positive it was not. Then he was asked whether the letter-books were produced or carbon copies, and answered that there were some little sheets of yellowish carbon copy stuff, which afterwards he referred to as "those blasted carbon copies."

Then he put in a statement shewing that he had paid in connection with the mining property over \$40,000—and, being asked if that was exclusive of Stimson's judgment against him on the note, he said he "never counted the judgment, and, if Stimson had told the absolute truth, he would not have got a judgment against me." Later on, he said he had been told there was a lot of information in the letter-books in letters between one McNeil and Stimson, and it was on these McNeil letters he had been recommended by counsel in Montreal to have a warrant issued against Stimson. Some of these letters were read to the jury as not having been before Mr. Justice Middleton. Then on cross-examination he volunteered the statement that he had been unsuccessful in the action because his principal witness had been intimidated and gone to the States. He could not say, as to one of the McNeil letters read, whether it was before Middleton, J.; and then the Court—apparently desiring to ascertain whether the judgment had referred to them—asked Baugh whether he had a copy of Mr. Justice Middleton's judgment, to which he replied that he had seen it in the Weekly Notes, and that the McNeil letter was not referred to; and he said that Stimson had contended that he had not seen the letter. Then Baugh was asked, where did Mr. Justice Middleton get the evidence to form his conclusion that McNeil had been opposed to the purchase by Stimson of the mining claim? and said from a Taylor letter.

Then his counsel objected to the reference to the decision in another Court, and was told by the Court that he had himself gone into the whole matter with Mr. Baugh, although Mr. Greer (for the Crown) objected; and, later on, that the Court wished to find out whether Mr. Justice Middleton had the evidence which Baugh said he had not. Then Baugh stated that the letters were not in.

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It is thus evident that Baugh, acting as a witness, was trying to give evidence not merely denying the conspiracy, but going to shew that Stimson was untruthful, and to explain away, at the instance of his own counsel, the fact of the judgment obtained against him as being owing to the absence of the documents, which, so far as appears, really had no material bearing on the issues involved. No serious attempt was made to shew the genuineness of the alleged forgeries. In these circumstances, it was, I think, open to the prosecution to shew that the judgment had not proceeded upon the absence of the practically immaterial documents, but that the Court had found upon the fact of the untruthfulness of the defendant's own statements. As to the mode of proving that, it was done from the source to which he himself referred as shewing that the documents had not been referred to; and I do not find that any objection was taken to the mode of proof, but only to the admissibility of the questions.

Then, even if the questions were strictly inadmissible, it does not appear to me that any substantial wrong or miscarriage was occasioned, as required by sec. 1019 of the Criminal Code. I read the charge of the learned Judge as cautioning the jury that, while they had heard the opinion of Mr. Justice Middleton as to the evidence of Baugh, that did not say he was telling an untruth before them, and it was for them to consider that.

I therefore think the conviction should stand.

HODGINS, J.A.:—The only possible grounds upon which the remarks made by a trial Judge, in his judgment, could be introduced in evidence, are: (1) that, if made in the presence of the party affected, and uncontradicted by him, they might form a quasi-admission; or (2) that they themselves were evidence of *res judicata*.

In this case the opinion of Mr. Justice Middleton was put in writing after the trial, and therefore the first ground is not open, even if it were the law, as to which see *Child v. Grace*, 2 C. & P. 193, and *Regina v. Britton*, 17 Cox C.C. 627.

As to the second point, authority is against the position that the reasons for, as distinguished from the fact of, a judgment, bind or estop any party, even if the judgment itself were admissible in a criminal prosecution. See *Re Allsop and Joy's Contract* (1889),

61 L.T.R. 213; *King v. Henderson*, [1898] A.C. 720. If not admissible upon either of the preceding grounds, then their introduction in a cross-examination as to credit can only result in establishing the opinion formed, in a civil action, of the truthfulness of the accused in relation to particular facts therein involved, by a third person well qualified to judge.

This is of course hearsay evidence. The cases would seem to limit the proof in a case of this kind to evidence of a formal record of adjudication reciting the desired fact, as in *Watson v. Little* (1860), 5 H. & N. 472; or to an official copy of the report of the trial Judge, required and admissible by law in Ireland, as in *Houstoun v. Marquis of Sligo*, 29 Ch.D. 448; or, failing the production of the record, to a willing admission by the accused of the result of a former trial and of the fact that in it he had given evidence, as in *Henman v. Lester*, 12 C.B.N.S. 776.

I am afraid that the way in which the views of Mr. Justice Middleton were insisted upon and used, as well as the invitation of the trial Judge to the jury to consider them in dealing with the veracity of the accused, compels the conclusion that a substantial wrong was or may have been done.

The result is, that both the questions must be answered in the negative and a new trial directed.

New trial ordered; MAGEE, J.A., dissenting.

[APPELLATE DIVISION.]

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Trading with the Enemy—Action for Money Admittedly Owning—Suspicion that Money Intended to be Paid by Plaintiffs to Alien Enemy—Evidence—Order Staying Proceedings until Termination of War—Reversal on Appeal—Costs.

The plaintiffs, a company incorporated under the laws of Ontario, sued, as assignees of a company similarly incorporated, to recover the price of goods sold and delivered by the assignor-company to the appellants. The defendants admittedly owed the money sued for:—

Held (HODGINS, J.A., dissenting), that an order staying all proceedings in the action until the termination of the war should not have been made, because there was no evidence to warrant the conclusion that the money sued for, if recovered from the defendants, would be paid, or that the plaintiffs intended to pay it, to an alien enemy; and that was the only ground upon which the order was supported.

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If it had been shewn that the plaintiffs were merely agents for, and that the money owing by the defendants was really owed to, a German or Austrian person, firm or corporation, it would have been proper to have stayed the action during the war; but the contrary was shewn.

Continental Tyre and Rubber Co. (Great Britain) Limited v. Daimler Co. Limited, [1915] 1 K.B. 893, applied.

No costs of the application for the order nor of the appeal were allowed to either side.

Order of FALCONBRIDGE, C.J.K.B., in Chambers, reversed.

Per HODGINS, J.A.:—The offence of trading with the enemy is a serious one and should be dealt with seriously. The payment here sought would, it was alleged, if recovered, be for the benefit of the enemy. The matter should not be looked at as if it were a question of onus or presumption; but, if there was ground for supposing that the payment might be indirectly for the benefit of the enemy, the rule stringently applied in the case of criminal offences should prevail in civil actions.

Rex v. Kupfer, [1915] 2 K.B. 321, applied.

The plaintiffs, in the evidence adduced by them, seemed to have avoided meeting the exact point raised by the defendants—would a judgment recovered by the plaintiffs result in a payment being made for the benefit of the enemy?

The case made by the defendants was not satisfactorily met; but the order made in Chambers was not the appropriate one. The plaintiffs should have judgment for the amount claimed, with a stay of execution (Rule 537) or a direction for payment of the amount into Court (Rule 534), and with leave to the plaintiffs to apply for permission to issue execution or for payment out of Court on satisfying a Judge that no breach of the Proclamation against trading with the enemy was intended or would occur.

AN appeal by the plaintiff company from an order of FALCONBRIDGE, C.J.K.B., in Chambers, made on the application of the defendant company, staying all proceedings in this action until the termination of the war.

The action was brought to recover the price of goods sold and delivered by Dickerhoff Raffloer & Company of Canada Limited to the defendant company; the plaintiff company sued as assignees of the Dickerhoff company, a company incorporated under the laws of Ontario and carrying on business and having its head office in Ontario, the plaintiff company being also an Ontario company.

The defendant company admittedly owed the money sued for.

The order appealed from was made on the ground that the money sued for was, if recovered, to be paid to alien enemies.

March 22. The appeal was heard by MEREDITH, C.J.O., GARROW, MACLAREN, MAGEE, and HODGINS, JJ.A.

I. F. Hellmuth, K.C., and *A. C. McNaughton*, for the appellants, argued that there was no evidence to shew that the money in question would be paid to alien enemies, or that the appellants intended that it should. At most, there was only sus-

picion on the part of the defendants. It had not been shewn that the appellants were the agents for an enemy corporation, or that the money was owed to an enemy corporation. In these circumstances, the order should not have been made: *Continental Tyre and Rubber Co. (Great Britain) Limited v. Daimler Co. Limited*, [1915] 1 K.B. 893.

H. S. White, for the defendants, respondents, contended that the payment would be for the benefit of the enemy. If there was not sufficient material before the Court to prove this to a demonstration, neither was it shewn by the appellants that the money would not go to the enemy. The defendants were willing to pay the money into Court, to be paid out to the plaintiffs upon their satisfying the Court of its lawful destination. He referred to *Rex v. Kupfer*, [1915] 2 K.B. 321.

April 3. MEREDITH, C.J.O.:—This is an appeal by the plaintiffs from an order dated the 21st January, 1916, made by the Chief Justice of the King's Bench, on the application of the respondents, by which all proceedings in the action are stayed until the termination of the present war between Great Britain and Germany and Austria.

The action is brought to recover the price of goods sold and delivered by Dickerhoff Raffloer & Company of Canada Limited to the respondents, and the appellants claim to recover as assignees of that company. Dickerhoff Raffloer & Company of Canada Limited was a company incorporated under the laws of Ontario and carrying on business in Ontario, where it had its head office.

It was conceded by Mr. White that, if the action had been brought by that company, the respondents would have had no defence to it, and would not have been entitled to such an order as was made; but he contended that the order appealed from was properly made, on the ground that the money sued for is "intended to be paid to alien enemies."

Assuming for the purposes of the motion that it was the intention of the appellants, if the money sued for were recovered or paid, to pay it to an alien enemy, I am of opinion that the order ought not to have been made, because there was no evidence to warrant the conclusion that the money would be

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paid, or that the appellants intended to pay it, to an alien enemy.

The evidence establishes that the appellant company was formed for the purpose of acquiring, and that it has acquired, the business and assets of Dickerhoff Raffloer & Company of Canada Limited, and that the charter of that company has been surrendered; that that company was incorporated on the 18th May, 1906, for the purpose of buying, selling, exporting, importing, manufacturing, and dealing with goods, wares, and merchandise, and to take over and thereafter carry on a similar business theretofore carried on in Toronto by a corporation organised and existing under the laws of the State of New York, with its principal office in New York City, under the name of Dickerhoff Raffloer & Company; that the Ontario company took over the business carried on by the American company and continued to carry it on, "conducting the business in the customary manner, that is, by purchasing goods from manufacturers in its own name and upon its own credit and thereafter selling the goods so purchased from manufacturers," and it also "acted as manufacturer's agent for several important English manufacturers, but for no others, obtaining upon samples orders for such manufacturers' goods and receiving commissions on the sales;" that the goods sold to the respondents had all been purchased by the Ontario company for its own account and were its own property; that the company acted as principal, and not as agent, factor, or commission salesman, and was "not liable for an accounting therefor to any one except its shareholders and creditors;" that the American company acted as banker for the Ontario company, receiving from time to time money from it and from time to time paying out the money for the account of the Ontario company; that the American company kept a separate account of the money so received and disbursed, and that it was the sole and exclusive property of the Ontario company; that at the outbreak of the present war all purchases of German or Austrian goods by the Ontario company, either by itself or by any one on its behalf, ceased, and all remittances to Germany or Austria, directly or indirectly, by the company or by any one on its behalf, were immediately stopped; that the consideration for the transfer of the business and assets of the company to the appellants was paid by allotting to the company

all the shares in the appellant company except five, which were sold for cash; that the business so transferred has since been carried on by the appellants. Of the shares allotted to the company, a proportion equivalent to his interest in the Ontario company was apportioned to Will P. White, the president of the appellant company and former managing director of the Ontario company, and the remaining shares were sold to George Carlton Comstock, and the proceeds of the sale were divided among the shareholders of the Ontario company, all of whom were American citizens or American corporations; and that the appellants are the owners in their own rights of the claim sued for.

It also appears that the only shareholders in the appellant company are White, Comstock, Watson, of Montreal, who owns one share, and Rendel & Brown, of New York, who each hold one share.

Such being the state of facts, I am unable to understand upon what possible ground an order staying the action could be made

If it had been shewn that the appellants were merely agents for, and that the money owing by the respondents was really owed to, a German or Austrian person, firm or corporation, it would have been proper to have stayed the action during the war; but that is not shewn; the contrary is proved.

The case of *Continental Tyre and Rubber Co. (Great Britain) Limited v. Daimler Co. Limited*, [1915] 1 K.B. 893, establishes that, even if all the shareholders in an English company and some of its directors are German or Austrian subjects, that affords no ground for staying an action brought by the company.

I am clearly of opinion that the learned Chief Justice ought not to have made the order, and that the order must be discharged.

I have had more difficulty in coming to a conclusion as to the costs of the motion and of the appeal.

If it had been that the appellants were merely agents, and that the money owed by the respondents was owed not to them, but to a German or Austrian principal, and that that was known to the respondents, it would have been not only the right but the duty of the respondents to have resisted payment during the war; and I cannot say that, in the circumstances, if, as I think, they believed, or at all events suspected, that the appellants

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were not principals but agents of Germans or Austrians, they should be mulcted in the costs of the application, though it has been unsuccessful, nor do I think that they should be ordered to pay the costs of the appeal, as they had succeeded in convincing the learned Chief Justice that the circumstances were such as to make it proper to stay the action.

GARROW, MACLAREN, and MAGEE, JJ.A., concurred.

HODGINS, J.A.:—Appeal from the order of the Chief Justice of the King's Bench staying proceedings during the war, on the ground that payment will be for the benefit of the enemy.

It was argued that the material on which the order was made was insufficient. Possibly that is so; if the matter is treated as arising in an ordinary action under normal conditions. But, in time of war, I believe that, notwithstanding such lack, it is the duty of the King's Courts, when seized of the matter, to satisfy themselves that nothing is permitted or sanctioned that may result in the smallest evasion of the legislation passed for the safety of the realm or of the Proclamations under it.

In *Rex v. Kupfer*, [1915] 2 K.B. 321, a case where the prisoner was convicted of making a payment for the benefit of the enemy, he having paid a sum of money (for which he himself as well as enemy subjects were liable to a neutral) to a London bank which had a branch in Holland, with instructions to credit the neutral, thus extinguishing the indebtedness of the enemy subjects to that neutral, Lord Reading, C.J., speaking for the Court, said (p. 340): "We desire to make it quite plain in this Court that the offence of trading with the enemy is a serious offence and should be dealt with seriously by those whose duty it is to try these cases."

The payment sought to be recovered will, it is here alleged, be for the benefit of the enemy; and, if the rule is stringently applied in the case of a criminal offence, it can hardly be suggested that it should not prevail in civil actions.

It is in this spirit that the matter should be looked at, and not as if it were a question of onus or presumption.

The goods in question were buttons supplied on almost every day between the 9th February and the 13th May, 1915, in comparatively small lots and to various departments; the largest

item being \$911.04 on the 6th May, 1915. The total, with interest, is \$7,550.27. About the 6th May, 1915, the question was raised by the respondents, whether the payment to Dickerhoff Raffloer & Company of Canada Limited (referred to hereafter as the Canadian company), from whom the respondents had purchased the goods, would not be a payment to or for the benefit of alien enemies; and on the 6th May the respondents said they would pay if a satisfactory letter was given "to the effect that the money would not go to the benefit of a country at war with Great Britain." The response sent on that day contained the assurance: "We will guarantee that none of the Canadian company's money will be sent to Germany or Austria during the war."

This is not what was asked for, and evades the element of indirect benefit. It may or may not have any significance that on the 10th May the appellant company was formed, and a transfer of all the assets of the company offering that guaranty was made to the appellants, who are now seeking to compel payment, the guaranty being thus valueless even if sufficient in form.

Both the appellants and the Dickerhoff company are Canadian corporations, and the evidence is that they have no alien enemy shareholders. Hence, *primâ facie*, the appellants, if the claim has been properly assigned, will be entitled to judgment. But the point raised is much more far-reaching than that, and the difficulty is chiefly caused by the appellants themselves not making it clear what are the financial relations between them and the parties or corporation in New York, whose Canadian business they acquired. It is evident from Mr. White's letter of the 1st May, 1915 (exhibit A), that the Canadian company had an "account in German office," which, I presume, means either their German office or the German office of the New York Dickerhoff company. The letter states that this account was "cancelled" as soon as war was declared. Mr. White's affidavit adds the information that on the outbreak of war "all remittances to Germany and Austria, directly or indirectly, by the Canadian company or by any one on its behalf, were immediately stopped."

Mr. White further says in his letter: "A separate account is kept in New York for the Canadian company;" and in his affidavit

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he says (para. 5): "In the foregoing connection, the explanation of my letter to Mr. Vaughan of May 6th, 1915, referred to in Mr. Vaughan's affidavit as exhibit B, is that Dickerhoff Raffloer & Company, the predecessor of the Canadian company, and, as aforesaid, an American corporation of New York, acted as banker for the Canadian company, receiving from time to time money from it and from time to time paying out such money for the account of the Canadian corporation. The American corporation kept a separate account of the money so received and disbursed, the same being the sole and exclusive property of the Canadian company handling such money as banker and not otherwise."

As to the stock in trade of the Canadian company, the following is from Mr. White's letter: "All German and Austrian goods in stock were shipped and paid for prior to the declaration of war." "The remainder of our stock of German and Austrian made goods is now very limited."

In his affidavit this statement is made in reference to the goods the price of which is now sued for (para. 4): "The goods so sold had all been purchased by the said corporation of Dickerhoff Raffloer & Company of Canada Limited, for its own account, which corporation had the sole and absolute title to the same and the sole and exclusive interest therein and in and to the proceeds thereof, and as to which goods and the proceeds thereof the said corporation of Dickerhoff Raffloer & Company of Canada Limited acted as principal, and not as agent, factor, or commission salesman, and was not liable for an accounting therefor to any one except its shareholders and creditors."

From these facts, if Mr. White's letter is read as well as his affidavit, there may fairly be deduced these conclusions: that the Canadian company was at the outbreak of war buying direct from Germany and Austria, and remitting directly there; that the goods "in stock" on the date of Mr. White's letter, the 1st May, 1915, were purchased and paid for prior to the declaration of war; that these goods cannot include those delivered to the respondents prior to that date, i.e., amounting to \$6,308.10; that as to all the goods sold to the respondents the appellants were the owners and solely interested therein; and that the American company acted and still acts as banker for the Canadian company, and kept and keeps a separate account for it as such banker;

and that remittances to Germany and Austria, directly or indirectly, by the Canadian company or by any one on its behalf, were, on the outbreak of war, immediately stopped.

These conclusions naturally raise the question whether the goods to the amount of \$6,308.10, delivered prior to the date of Mr. White's letter, as to the purchase of which no information is given, were paid for direct before the war, or whether their value still represents an indebtedness to Germany outstanding in the form of bills of exchange; why, on the cancellation of the Canadian company's account in the German office, a similar account was opened with the American firm as bankers instead of in a regular bank; and whether that firm or the Canadian company would, on receipt of the amount now sued for, liquidate that indebtedness, if it still exists, out of that account. The fact that the Canadian company owned the goods and were entitled to the proceeds is not inconsistent with the fact that they may still owe for them, and that payment may yet have to be made to holders of negotiable instruments for the benefit of the German vendors.

It may be that the explanations given are intended in effect to cover these matters, but they do not in terms or by necessary implication do so. The order of the learned Chief Justice will prevent any possible breach of the Proclamation. Should it be reversed, unless it is clearly established that its reversal will not change the situation in that regard?

It is well pointed out in *Rex v. Kupfer*, [1915] 2 K.B. at p. 336, that the prohibition is intended to prevent payments which in any way enure to the benefit of the enemy:—"The first question is, what is the meaning of the words 'for the benefit of an enemy?'" In our judgment those words were deliberately introduced for the purpose of preventing devices, tactics, and various means by which mercantile houses might seek, but for those words, to make payments indirectly, notwithstanding that there is an express prohibition of a direct payment. It was doubtless considered, that in making this Proclamation it was necessary to cover that ground and to throw the net wide in order that there should not be this means of evading the law and therefore of assisting the enemy by adding to or protecting his resources. Those words are very wide, and must be construed to have a

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very wide application. It is not necessary or desirable to define exactly the meaning of the words. They are intended to cover the making of payments to the enemy by any device or by any recourse to indirect means."

What these indirect means may be is suggested in *His Majesty's Advocate v. Innis*, [1915] S.C. (J.) 40, by the Lord Justice General, who at p. 42, says: "A trader in this country who desires, or has an intention, or proposes, to trade with the enemy may well select as an intermediary any person resident in a neutral country, even though that person is not, at the time when a communication is addressed to him, a representative either of the proposed buyer or of the proposed seller. The statutory crime is that of indirectly supplying goods or procuring the supply of goods, or trading with the enemy, and one of the ways in which a man may indirectly effect his purpose is by selecting an intermediary through whose intervention he will secure his aim; and it does not appear to me to be necessary to say that that intermediary is, at the moment when he is selected, the active agent or representative of the intending purchaser or the intending seller."

That case, and others such as *Moss v. Donohoe* (1916), 32 Times L.R. 343 (P.C.), *His Majesty's Advocate v. Hetherington*, [1915] S. C. (J.) 79, and *Rex v. Oppenheimer*, [1915] 2 K.B. 755 (C.A.), shew that the Courts treat the prohibition in the orders in council as absolute, universal, and subject to no exception whatsoever arising from considerations usually applied in mercantile law.

The appellants seem to have avoided meeting the exact point raised by the respondents—will this judgment result in a payment being made "for the benefit of the enemy," just as the proposed guaranty evaded it?

With two shareholders in New York who are lawyers, one of whom apparently instructed this action, it would be easy to state exactly just what the facts are with regard to payment for the goods in question. Is it outstanding in any form, and will this money, whether it is called "the Canadian company's money," or whether it becomes that of another party, be paid for the benefit of the enemy?

I am unable to see why the guaranty was not given as asked and in the terms suggested, if, as is argued, there is no possibility

of the money finding its way "to the benefit of a country at war with Great Britain."

While I am not satisfied on these points, I do not think the order made is the appropriate one under the circumstances. The appellants are in strict law entitled to judgment for the claim, unless that judgment would have the effect of bringing about a payment in contravention of the Proclamation. At present, and on the material before the Court, I cannot say that it must have that result. On the other hand, I am not satisfied that the facts are fully disclosed. There is no provision at present in our law for the intervention of a public custodian, but there is jurisdiction to stay execution until fulfilment of any condition (Rule 537), or to direct the money to be paid into Court (Rule 534), with leave to the appellants to apply to issue execution or for payment out on satisfying a Judge of the Supreme Court that no breach of the Proclamation is intended or will occur.

In this I am practically following the course adopted by Mr. Justice Rowlatt in *Schmitz v. Van der Veen and Co.* (1915), 112 L.T.R. 991. See also *Guyot-Guenin & Son v. Clyde Soap Co.*, [1915] 2 Scots L.T. 244.

I think the appeal should be allowed, and judgment entered for the appellants, who may elect as to a stay of execution or payment into Court. The costs of the application before the Chief Justice of the King's Bench and of this appeal should be dealt with by the Judge before whom the suggested motion may be made.

Appeal allowed ; HODGINS, J.A., dissenting.

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April 3.

PEARSON v. CALDER.

Married Woman—Action against—Contract—Coverture not Plead—Estoppel—Judgment—Affirmance by Appellate Court—County Court—Order Changing Form of Judgment from Personal to Proprietary—Jurisdiction.

This action (upon a contract) was brought in a County Court against the defendant as a feme sole; after trial, judgment passed against her, and was entered in the usual way, nothing appearing on the face of the proceedings or in the evidence to shew that she was a married woman. The judgment was affirmed by a Divisional Court upon appeal. After the result of the appeal had been certified to the County Court, the plaintiff applied to the Judge of that Court to amend the judgment, upon the ground that it had been entered by mistake as a personal, instead of a proprietary, judgment—the defendant having been, when the contract was entered into and ever since, a married woman. Upon the application, the Judge made an order directing that the judgment should be discharged, with leave to the plaintiff to enter the proper judgment against a married woman:—

Held, that the Judge had no jurisdiction to make the order; and it was set aside upon appeal.

The defendant, not having pleaded coverture, would be estopped by the judgment from afterwards setting up that she was a married woman.

Oxley v. Link, [1914] 2 K.B. 734, and *Prevost v. Bedard* (1915), 51 S.C.R. 269, distinguished.

APPEAL by the defendant from an order of the Senior Judge of the County Court of the County of Wentworth, in an action in that Court, made upon the application of the plaintiff to amend the judgment, directing that the judgment entered against the defendant should be discharged, with leave to the plaintiff to enter judgment in the form appropriate to a case where the defendant is a married woman.

The nature of the action appears from the report of the judgment on appeal from the judgment of the County Court: *Pearson v. Calder* (1916), 35 O.L.R. 524.

March 24. The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, J.J.A.

W. S. MacBrayne, for the appellant, referred to *Pearson v. Calder*, 35 O.L.R. 524. The English Rule corresponding to our Rule 521, which provides for the correction of accidental slips or omissions, is discussed in *Oxley v. Link*, [1914] 2 K.B. 734, 742, where Kennedy, L.J., while agreeing with the majority of the Court, differed from them in his view of the application of the Rule. Reference was also made to *Ainsworth v. Wilding*, [1896]

1 Ch. 673, 677; *Hession v. Jones*, [1914] 2 K.B. 421; *Saskatchewan Land and Homestead Co. v. Moore* (1915), 22 D.L.R. 903, 8 O.W.N. 458, 525. *Prevost v. Bedard* (1915), 51 S.C.R. 629, is distinguishable from the case at bar.

M. Malone, for the plaintiff, respondent, referred to Rule 507 (as to the right of appeal); *Joss v. Fairgrieve* (1914), 32 O.L.R. 117; *In re Swire* (1885), 30 Ch.D. 239.

MacBrayne, in reply, referred to *Voight Brewery Co. v. Orth* (1903), 5 O.L.R. 443.

April 3. The judgment of the Court was delivered by MEREDITH, C.J.O.:—This is an appeal by the defendant from an order of the Judge of the County Court of the County of Wentworth, dated the 7th March, 1916.

The respondent brought an action in the County Court of the County of Wentworth against the appellant, who is said to have been at the time of entering into the contract sued on, and when the action was brought, and is now, a married woman.

The action was brought against her as a feme sole, and, after trial, judgment passed against her, and was entered in the usual form, nothing appearing on the face of the proceedings or in the evidence to shew that she was a married woman. An appeal was taken to a Divisional Court, and the judgment was affirmed. After the appeal was disposed of, and the result of it was certified to the Court below, the respondent made an application to the Judge of the County Court to amend the judgment that had been entered, upon the ground that it had been entered against the appellant "by error and mistake as a personal judgment and not a proprietary judgment."

This relief was refused, but by the order now in appeal it was ordered, at the request of the respondent's counsel, that the judgment which had been entered should be discharged, "with leave to the" respondent "to enter the proper judgment against a married woman."

Why it was thought necessary to do this, I do not understand. The appellant had not pleaded coverture or set up that she was a married woman when the contract sued on was entered into, and I do not see why the respondent is not entitled to enforce his judgment as it has been entered, i.e., as if the appellant was not when the contract was entered into a married woman.

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It is clear, I think, that before the passing of the Married Women's Acts, if a married woman was sued as a feme sole, and either failed to plead coverture, or, having pleaded it, failed to prove her plea, she was estopped by the judgment from afterwards setting up that she was a married woman: *Beynon v. Jones* (1846), 15 M. & W. 566; *Newton v. Boodle* (1847), 9 Q.B. 948; *Scott v. Morley* (1887), 20 Q.B.D. 120; and there is no reason for thinking that the Married Women's Acts have made a change in the law in that regard.

It is a very different case where, as in *Oxley v. Link*, [1914] 2 K.B. 734, the judgment was a default judgment entered as a personal judgment, although the defendant was described in the writ of summons as "a married woman sued in respect of her separate estate."

I am unable to understand upon what principle the learned Judge proceeded in making the order appealed from. The case was not one in which the formal judgment that had been entered was not the judgment which the Court had pronounced, for it was not pretended that the judgment as entered was not in exact accordance with the judgment that had been pronounced at the trial; and I am of opinion that, even if a County Court has the same inherent power as to correcting judgments as is possessed by the Supreme Court, and there had not been an appeal to a Divisional Court, there would have been, for the reason I have mentioned, no jurisdiction to make the order; and it is an *à fortiori* case where the judgment of the County Court has been affirmed by an appellate Court, as the judgment against the appellant has been, that there is no such jurisdiction.

The learned Judge seems to have had in mind the order that was made in *Oxley v. Link* and to have followed to a certain extent what was done in that case. If that was the case, he has overlooked the fact that in that case the judgment was a default judgment, and not, as in this case, a judgment entered after trial upon issues joined between the parties and affirmed by a Divisional Court, and the further facts that the order was not made upon the plaintiff's application to amend but upon an application by the defendant to set aside the judgment, and that the plaintiff's application was dismissed and the order that was made on the defendant's application was that the judgment should be

set aside and that the defendant deliver her defence within fourteen days. Besides all this, it appeared on the face of the proceedings that a wrong judgment had been entered. What has been done by the order in this case is to discharge a final judgment, properly entered after the trial of the action in accordance with the judgment pronounced at the trial and affirmed by a Divisional Court, and to substitute for it a different judgment, and that without any amendment of the pleadings having been made or any opportunity being afforded to the appellant to make her defence, if she has any, to the new case which the respondent is setting up against her.

I have not overlooked what was said by Duff, J., in *Prevost v. Bedard*, 51 S.C.R. 629, 631. There is nothing said by him that helps the respondent. His view was that, notwithstanding that a judgment of a Superior Court of Quebec had been affirmed by the Supreme Court of Canada, the Superior Court "must possess authority to correct errors in the record of one of its judgments to whatever extent it might be necessary to do so for the purpose of making the record conform to the judgment which the Court obviously intended to pronounce."

The case with which we are dealing is not such a case; for, as I have said, the judgment which has been entered is the judgment which the Court intended to pronounce, and indeed was the only judgment which upon the pleadings it could pronounce.

I am of opinion that the appeal should be allowed and the order appealed from discharged, with costs here and below.

Appeal allowed.

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[APPELLATE DIVISION.]

April 3.

LINSTEAD V. TOWNSHIP OF WHITCHURCH.

Highway—Nonrepair of Bridge—Collapse under Weight of Traction Engine—Death of Person Seated on Engine—Liability of Municipal Corporation—Traction Engines Act, 2 Geo. V. ch. 53 (R.S.O. 1914, ch. 212), sec. 5 (4)—Construction of—Failure to Perform Duty Imposed—Necessity for Laying down Planks to Protect Surface of Bridge—Identification of Deceased with Owner of Engine—Position of Deceased with Regard to Owner.

The judgment of MASTEN, J., 35 O.L.R. 1, was affirmed by a Divisional Court of the Appellate Division.

Held, by MEREDITH, C.J.O., and HODGINS, J.A., that failure to fulfil the duty (to lay down planks) imposed by what was formerly sec. 10 (3) of the Traction Engines Act, R.S.O. 1897, ch. 242 (as amended by 3 Edw. VII. ch. 7, sec. 43, and 4 Edw. VII. ch. 10, sec. 60), now sec. 5 (4) of R.S.O. 1914, ch. 212, did not prevent the owner of a traction engine weighing less than eight (now ten) tons, "used for threshing purposes or for machinery in construction of roadways," who suffered damage owing to a bridge over which the engine was being run not being of sufficient strength to bear the weight of it, from recovering for the loss; that the duty was not an absolute duty, and that, where it was not, in the circumstances of the particular case (as should be found upon the evidence in this case), necessary to lay down planks in order to protect the surface of the bridge from injury from contact with the wheels of the engine, there was no duty to lay down planks; and that, *a fortiori*, the same construction should be placed upon the enactment in force when the accident in question in this action occurred (2 Geo. V. ch. 53, sec. 5 (4)), the provision as to laying down planks being no longer in the form of a proviso.

Goodison Thresher Co. v. Township of McNab (1908-10), 19 O.L.R. 188, 44 S.C.R. 187, considered. Owing to the conflict of judicial opinion in that case, the question presented for decision in this case should be treated as *res integra*.

Held, by GARROW and MACLAREN, J.J.A., that the revision of the statute had not made any substantial change in the law as it stood when the *Goodison* case was decided. What was there determined—that a person under the statutory obligation to lay planks upon a bridge over which he proposed to pass with a traction engine, who had neglected to do so, could not be heard to complain that the municipal corporation had neglected its prior statutory duty properly to maintain the bridge—is now the law of the Province; but the *Goodison* case should be distinguished upon the ground that, on the facts of this case, no duty was imposed upon the deceased in connection with the laying of the planks, and there was no sufficient ground for identifying the deceased with the owner of the engine, who was present and in charge. The deceased was not a person "proposing to run any traction engine" across a bridge: sec. 5 (4) of the present Act; and was not the servant or agent of the owner, but was in the position of a passenger.

Mills v. Armstrong (1887), 13 App. Cas. 1, *Flood v. Village of London West* (1896), 23 A.R. 530, and *Foley v. Township of East Flamborough* (1899), 26 A.R. 43, referred to.

APPEAL by the defendants from the judgment of MASTEN, J., 35 O.L.R. 1.

February 8. The appeal was heard by MEREDITH, C.J.O., GARROW, MACLAREN, MAGEE, and HODGINS, J.J.A.

W. N. Tilley, K.C., and *James McCullough*, for the appellants, argued that it was the duty of the deceased, before attempting to cross the bridge, to lay down planks, as required by the Traction Engines Act, 2 Geo. V. ch. 53, sec. 5 (4), and that non-compliance with the provisions of this sub-section relieved the appellants from liability. Reference was made to *Goodison Thresher Co. v. Township of McNab* (1908-10), 19 O.L.R. 188, 44 S.C.R. 187. The effect of this decision is not altered by the subsequent amendments which have been made in the statute.

T. Herbert Lennox, K.C., and *C. W. Plaxton*, for the plaintiff, respondent, argued that the findings of fact of the learned trial Judge were supported by the evidence, and that the *Goodison* case was, as held by him, distinguishable from the case at bar. They referred to *Welsh v. Town of Geneva* (1901), 85 N.W. Repr. 970; *Hough v. Windus* (1884), 12 Q.B.D. 224; *Gorris v. Scott* (1874), L.R. 9 Ex. 125, 128.

Tilley, in reply, referred to *Ricketts v. Thos. Tilling Limited*, [1915] 1 K.B. 644. The deceased was within the words of the Traction Engine Act, as "a person proposing to run" a traction engine over the bridge.

April 3. MEREDITH, C.J.O.:—This is an appeal by the defendants from the judgment dated the 25th November, 1915, which was directed to be entered by Masten, J., after the trial of the action before him, sitting without a jury, at Toronto, on the 2nd, 3rd, 4th, and 5th days of that month.

The respondent is the widow of the late Walter Linstead, deceased, and brings this action under the Fatal Accidents Act to recover damages for the loss she has sustained by the death of her husband, which she alleges was occasioned owing to the default of the appellants in performing their statutory duty of keeping in repair a bridge under the jurisdiction of their council.

The deceased met with his death owing to the collapse of the bridge while he was driving over it on a traction engine less than ten tons in weight, used for threshing purposes, belonging to a man named Pipher. The deceased was not the driver of the engine, but was riding on it, and was permitted by the regular driver, who was also upon it, to drive it.

The condition of the bridge and the circumstances in which

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the accident happened are fully described in the reasons for judgment of the learned trial Judge, and it is therefore unnecessary to restate them.

The appellants, besides denying the breach of duty alleged, contend that the respondent is not entitled to recover because, before crossing the bridge, planks of sufficient width and thickness to fully protect the flooring or surface of the bridge from any injury that might otherwise result to it from the contact of the wheels of the engine were not laid on the bridge, the contention being that the effect of sub-sec. 4 of sec. 5 of the Traction Engines Act (R.S.O. 1914, ch. 212) is to make the doing of this a condition precedent to the exercise of the right to cross; and that, as the direction of the statute was not complied with, the deceased was not lawfully on the bridge, and no duty towards him in respect of it rested upon the appellants.

Upon the argument before us it was contended by counsel for the appellants that in *Goodison Thresher Co. v. Township of McNab*, 19 O.L.R. 188, 44 S.C.R. 187, the effect of the enactment then in force, R.S.O. 1897, ch. 242, sec. 10, as amended by 3 Edw. VII. ch. 7, sec. 43, and 4 Edw. VII. ch. 10, sec. 60, was determined to be that for which they contend; that the subsequent amendments have changed the law only so far as to bring within the exception, as to the duty to strengthen bridges and culverts, engines of less than ten tons in weight used for threshing purposes and for machinery for the construction of roadways (eight tons having been the maximum weight under the former enactments); and that the decision in the *Goodison* case is binding upon us.

The trial of the action in that case took place before Anglin, J., and his reasons for judgment are reported in 19 O.L.R., commencing at p. 189. His conclusions were:—

(1) That the use of the highways and bridges by traction engines of the character of that which was being driven by the plaintiff was a lawful user, and that the statutory duty of keeping in repair their highways and bridges which rested on the defendants made it incumbent upon them to keep their highways and bridges in such a condition and state of repair as that they should be reasonably sufficient and safe for that kind of vehicle and traffic.

(2) That the duty imposed by sec. 10 (3) (now sub-sec. 4 of sec. 5) was not an absolute duty, and did not require that planks

should be laid down except where it was necessary to lay them for the protection of the surface or flooring from injury that might otherwise result to it from contact with the wheels of the traction engine.

(3) That, inasmuch as the collapse of the bridge was due, as he found, to the insufficiency of the beams and stringers to sustain the weight of the engine, and it was not necessary, as the result proved, to lay down planks for the purpose mentioned in sec. 10 (3), the defendants were liable in damages to the plaintiff for the injury he had sustained by reason of the defendants' failure to discharge their statutory duty.

He also held that the words "flooring or surface," as used in the sub-section, were interchangeable terms and did not embrace the beams and stringers which supported the planking of the bridge.

On appeal to a Divisional Court, this judgment was affirmed. The reasons for the judgment of the Court are not reported, but I have the authority of one of its members for saying that the Court agreed with the view of Anglin, J., as to the nature and extent of the duty imposed by sec. 10 (3).

The Court of Appeal reversed the judgment, my brothers Garrow and Maclaren, JJ.A., and Osler, J.A., being of opinion that compliance with the conditions mentioned in sec. 10(3) was in the nature of a condition precedent to the exercise of the right to cross the bridge; but the Chief Justice of Ontario (Moss) and Meredith, J.A., being of opinion that the view of the trial Judge as to the nature and extent of the obligation was right, dissented.

On appeal to the Supreme Court of Canada, the decision of the Court of Appeal was affirmed, the Chief Justice (Fitzpatrick) and Girouard, J., dissenting.

Davies and Idington, JJ., adopted the view of the majority of the Judges of the Court of Appeal, the latter agreeing fully with the reasoning of Garrow, J.A., and the former dissenting from the proposition that "the object of the proviso" (that is, the proviso in sec. 10(3)) "was simply and only the protection of the surface of the bridge from being injured" (p. 191).

Duff, J., was of opinion that the action should be dismissed "because . . . the findings of the learned trial Judge shew that *mishap* was caused by the failure of the plaintiffs' servants

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to perform the conditions under which alone they were entitled to take the engine upon the bridge" (p. 194). He did not agree with the view that the purpose of the proviso was only to protect the surface of the floor from defacement, and was of opinion (p. 195) that "the meaning of the word 'flooring' as applied to a bridge . . . includes such longitudinal joists as that which gave way in the accident in question here;" but it is, I think, not unreasonable to conclude that, if he had agreed with the view of the trial Judge, the Divisional Court, and the dissenting Judges of the Court of Appeal, as to the purpose of the proviso, he would have held that the plaintiff was entitled to recover.

Viewed in the most favourable light for the now appellants, the result of this conflict of judicial opinion is that (1) five Judges, Osler, Garrow, and Maclaren, J.J.A. and Davies and Idington, J.J., were of opinion that the duty imposed by the proviso was absolute, and that there was no right to enter upon the bridge unless or until the planks had been laid down, and that eight Judges, Anglin, J., the three Judges of the Divisional Court, the Chief Justice of Ontario, Meredith, J.A., the Chief Justice of Canada, and Girouard, J., were of contrary opinion.

(2) Duff, J., was of opinion that the words "flooring or surface" included not only the surface of the flooring but also the boards and the frame supporting them; and Davies, J., was of opinion (pp. 191, 192) that the proviso was "clearly intended to protect the planks of the bridge from being broken through by reason of the great weight . . . which the rear wheels, if they passed directly over the planks, would necessarily bring to bear on them . . ."

But eight of the Judges were of a contrary opinion, an opinion which was, I think, shared by the Judges of the Court of Appeal who agreed that the appeal should be allowed. As I understand their reasoning, their view was that it was immaterial for what purpose the planks were required to be laid down, that the duty of laying down the planks was imperative, and that a person who drove his traction engine upon a bridge without having performed that duty did so unlawfully, and, if he or his engine were injured or damaged by the breaking down of the bridge, the corporation was under no liability to indemnify him for the loss he had sustained.

In view of this conflict of judicial opinion, we may properly, I think, deal with the question presented for decision on this appeal as *res integra*, and I proceed so to deal with it.

In my view, the scope and meaning of the Act are reasonably plain, and are that:—

1. Traction engines weighing over twenty tons may not be used upon any highway.

2. Traction engines of not more than twenty tons' weight may be used upon any highway, subject to the provisions of the Act.

3. The provisions as to which this right is subject are contained in sec. 5.

4. Except in the case of engines used for threshing purposes or for machinery in construction of roadways, before it is lawful for a person proposing to run an engine of less than twenty tons weight over a highway whereon no tolls were levied, to run it over the highway, it is made his duty to strengthen at his own expense all bridges and culverts to be crossed by the engine and (*sic*) to keep the same in repair so long as the highway is so used.

5. In the case of engines of less than eight tons in weight used for threshing purposes or for machinery in construction of roadways this duty is not imposed, but it is made the duty of a person proposing to run such an engine or any other engine of less than twenty tons weight, before crossing a bridge or culvert, to lay down on it planks of such sufficient width and strength as are necessary to fully protect the surface of the bridge or culvert from any injury that might otherwise result to the surface from the contact of the wheels of the engine or machinery.

It is important to observe the difference between the language used as to the duty which is imposed by sub-sec. 1 and that employed as to the duty which is imposed by sub-sec. 3. In the former case it is, "Before it shall be lawful to run . . . it shall be the duty;" and in the latter, "Before crossing any such bridge or culvert it shall be the duty." There must have been some reason for this difference, and it is not reasonable to conclude that where it was intended to make entry on the bridge or culvert unlawful, if the duty imposed had not first been performed, that intention was expressed in the clear language, "before it shall be lawful," and that, while that language is not used, it was not intended to make entry upon the bridge or culvert, without hav-

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ing performed the duty imposed, an unlawful act? There are, in my opinion, cogent reasons why such a difference should have been intended.

The Legislature evidently thought that bridges and culverts should be of sufficient strength to sustain the weight of an eight ton traction engine, of the kind mentioned in sub-sec. 3, passing over them, but that it was otherwise as to traction engines weighing more than eight tons; and, accordingly, in the case of the latter the duty was imposed upon the persons who desired to run such engines to strengthen the bridges and culverts over which they were intended to pass, and it was made unlawful to run these engines upon a highway until the bridges and culverts had been strengthened.

In the case of the excepted traction engines the duty of strengthening the bridges and culverts was not imposed; but, knowing, as the members of the Legislature, or at all events those from the rural districts, knew, that the wheels of traction engines are sometimes provided with projections from the smooth surface, some in the form of corks or grippers and others of spikes, and that unless some provision was made for the protection of the plank floors of bridges and culverts the planking would be torn or otherwise injured by these projections, they therefore provided against that happening by making it the duty of persons desiring to run any traction engine, not merely the excepted ones, over a bridge or culvert, before crossing it to lay down planks to protect the surface of the bridge from such an injury.

As I have said, the duty is imposed in respect of all traction engines, and I am unable to find in the language of the proviso or in the reason of the thing any ground for the contention that the imposition of this duty had anything to do with the strengthening of the bridge or culvert either directly or incidentally. Sub-section 1 dealt with the duty to strengthen, and that duty included the strengthening of every part of the bridge substructure, beams, joists and planking, where additional strength was necessary; and it would be strange indeed if, after having in the plainest language and the most comprehensive terms imposed that duty, it should have been thought necessary in the case of all traction engines to impose the minor duty of adding strength by the planking which is by the proviso required to be laid down, and a duty

which was already imposed by sub-sec. 1 in respect of all traction engines save the excepted ones.

The section, in my opinion, deals with the strengthening of the bridge or culvert and the protection of its flooring or surface as separate and distinct matters, the former by sub-sec. 1 and the latter by sub-sec. 3.

I venture to think that in using the terms "flooring or surface" no member of the Legislature had in view the meaning which an engineer would give to the word "flooring," but used it in what is its ordinary and popular sense, i.e., as meaning the planking or other material of which the surface was formed.

The use of the disjunctive "or" also, I think, supports the view that the two words were intended to be interchangeable terms. Then the injury to be guarded against is injury from the contact of the wheels. Contact carries in it the idea of touching, not of pressure exerted. If the proviso had been intended to mean what the appellants contend and some Judges have held that it means, one would have expected that the words used would have been, not simply "contact of the wheels," but those words and the additional words "and the added weight of the engine" or words of the like import.

There is some ground also for thinking that the only consequence intended to follow upon failure to perform the duty prescribed by sub-sec. 3 was the liability to the corporation for the damage resulting to the flooring or surface from the contact of the wheels; and, at all events, the presence of that provision in sub-sec. 3 and the absence of a similar provision from sub-sec. 1 point to the conclusion that it was thought by the draftsman of the Act that such a provision was not necessary in the latter case; because, if the duty of strengthening the bridges and culverts was not performed, the engine would be unlawfully on the bridge or culvert that was being crossed, and the owner of the engine would be answerable for any damage occasioned by his unlawful act. The provision as to the consequences of default which sub-sec. 3 contains seems to indicate that it was not intended that a person who drove his engine across a bridge or culvert without having first laid down the planking should be deemed to be a trespasser, but that he should be liable to make good the damage done to the "flooring or surface."

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That a person who has laid down planking sufficient to prevent injury to the surface of the bridge or culvert caused by the contact with the wheels has done all that sub-sec. 3 requires him to do, I have no doubt; and to require him to do what the appellants contend it is his duty to do would, in some cases at all events, be productive of more harm than good, because it would add materially to the weight which the bridge or culvert would have to bear.

Upon the whole, my conclusion is, that failure to fulfil the duty which sub-sec. 3 imposed did not prevent the owner of a traction engine weighing less than eight tons, "used for threshing purposes or for machinery in construction of roadways," who suffered damage owing to a bridge over which the engine was being run not being of sufficient strength to bear the weight of it, from recovering for the loss; but, if I am wrong in this, I am of opinion that the duty imposed was not an absolute duty, and that, where it was not, in the circumstances of the particular case, necessary to lay down planks in order to protect the surface of the bridge from injury from contact with the wheels of the engine, there was no duty to lay down planks.

If my view as to the construction to be placed upon the enactment which was under consideration in the *Goodison* case is right, *à fortiori* the same construction should be placed upon the enactment in force when the accident in question occurred, now that the provision as to laying down planks, which was in the former legislation a proviso to the sub-section which provided that sub-secs. 1 and 2 should not apply to engines used for threshing purposes or for machinery in construction of roadways of less than eight tons in weight, is no longer, in form at all events, a proviso. Being in the form of a proviso afforded ground for the argument that compliance with the requirement of the sub-section was a condition precedent to the operation of the exemption for which it provides.

In the case at bar, on the findings of fact of the trial Judge, which are fully supported by the evidence, the judgment was, in my opinion, properly entered for the respondent.

It is found "that the bridge was in a condition of disrepair, the stringers having rotted to a considerable extent at both ends, and that the bridge in consequence was inadequate and insufficient

for the carrying of the traffic entitled to pass over it;" and that "the damages to the plaintiff arose in consequence of the disrepair of the bridge; the accident happened by reason of the stringers giving way under the weight of the engine, and this collapse was owing to the rotten condition of the stringers."

In the *Goodison* case there was a finding that the use of the planks . . . when crossing the bridge would have added to the sustaining power of the stringers sufficiently to have enabled them to carry the weight of the engine with safety; but in the case at bar the trial Judge was unable to make such a finding, and the case for the appellants is therefore weaker than was the case of the defendants in the *Goodison* case.

There is no finding one way or the other as to the necessity for laying down the planking in order to protect the flooring or surface of the bridge from injury from the contact of the wheels of the engine; but, upon the evidence, my conclusion is that no such necessity existed. The only projections beyond the smooth surface of the wheels were what are called "grippers," which ran zig-zag around the hind wheels only. These grippers when new projected an inch and a half from the surface of the wheels, but had worn down so that they projected only three-quarters of an inch, and it is manifest that contact of wheels so equipped could have done no injury to the surface of the bridge, covered as it was, according to the evidence and the finding of the trial Judge, with earth to the depth of three or four inches, which doubtless afforded ample protection of the surface from injury from the contact of the wheels of the engine. I have the satisfaction of knowing, from information I have received from the trial Judge, that, if he had been asked to make a finding on this aspect of the case, his conclusion would have been the same as that which I have formed.

For these reasons, I would affirm the judgment and dismiss the appeal with costs.

In parting with the case, I venture to suggest that in the *Goodison* case the enactment under consideration was dealt with as if it had application only to wooden bridges and culverts, but it is common knowledge that wooden bridges and culverts are fast disappearing and being replaced by structures of steel or concrete or of both. The difficulty of giving to what is now sub-sec. 3 of sec. 5 the meaning which some of the Judges who took part in

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the judgment in that case gave to the corresponding provision of the enactment which was the subject of their consideration, is certainly increased, if indeed it does not become insuperable, when the facts I have just mentioned are taken into consideration.

HODGINS, J.A., agreed with MEREDITH, C.J.O.

GARROW, J.A.:—Appeal by the defendants from the judgment at the trial before Masten, J., without a jury, in favour of the plaintiff.

The case resembles but is not identical with the much discussed case of *Goodison Thresher Co. v. Township of McNab*, 19 O.L.R. 188, affirmed in 44 S.C.R. 187. That case determined that a person under the statutory obligation to lay planks upon a bridge over which he proposed to pass with a traction engine, who had neglected to do so, could not be heard to complain that the municipal corporation had neglected its prior statutory duty properly to maintain the bridge.

The statute as it then was has since been revised and re-enacted and is now the Traction Engines Act, R.S.O. 1914, ch. 212. But the revision has not, in my opinion—agreeing in this respect with Masten, J.—made any substantial change in the law as it stood when the *Goodison* case was determined.

Nor should effect be given to the suggestion that, because there were, as there undoubtedly were, differences of opinion expressed in the various judgments delivered in the *Goodison* case, the matters there determined may still be regarded as open. There is no room for reasonable doubt as to what was there actually determined. And what was so determined is now, in my opinion, the law of this Province, and must remain the law until altered by the Legislature, or by the ultimate court of appeal, the Privy Council.

Masten, J., distinguished this from the *Goodison* case, upon the ground of the absence here of a causal connection between the failure to observe the statutory duty and the injury.

It may also, I think, be further distinguished upon the ground that on the facts no duty was imposed upon the deceased in connection with the laying of the planks; nor is any sufficient ground of identification of the deceased with the owner, Pipher, who was

present and in charge, shewn, so as to bring the former within the culpability of the latter.

The language of the statute is (sec. 5, sub-sec. 4): "Before crossing any such bridge or culvert the person proposing to run any traction engine shall lay down on such bridge or culvert, planks" etc. The deceased was not a person proposing to run an engine across the bridge or culvert. He was neither the servant nor the agent of the owner, Pipher, who was present and in charge, but a person temporarily upon the engine by the invitation and with the consent of the owner, solely with the view and intention of obtaining a ride towards his home, in which direction the engine was proceeding. His position, therefore, was very much that of an ordinary passenger in a coach, the illustration most frequently used, or of a farmer getting a lift towards home in his neighbour's waggon, as in one of the cases about to be mentioned.

The old doctrine of identification between the driver and the victim as laid down in *Thorogood v. Bryan* (1849), 8 C.B. 115, after being frequently questioned, was finally overruled by the House of Lords in *Mills v. Armstrong* (1887), 13 App. Cas. 1.

Illustrations of the law upon the subject as applied in our own Courts occur in *Flood v. Village of London West* (1896), 23 A.R. 530, where, under peculiar circumstances, identification was held to exist, and *Foley v. Township of East Flamborough* (1899), 26 A.R. 43, where the opposite conclusion was reached.

I cannot but regret that this point of view, which seems to me to be one of importance, was not more fully discussed before us. It was, however, mentioned, and not, as far as I can see by my notes, abandoned, and may therefore, I think, be legitimately used at least to support the judgment.

I would dismiss the appeal with costs.

MACLAREN, J.A., agreed with GARROW, J.A.

MAGEE, J.A., agreed in the result.

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[APPELLATE DIVISION.]

April 3.

QUILLINAN v. STUART.

Libel—Opprobrious Epithets Applied to Woman—Defamatory Meaning—Imputation of Unchastity—Judge's Charge—Misdirection—Excessive Damages—New Trial.

The plaintiff, a young woman employed by a business man with whom the defendant had business relations, complained that the defendant had libelled her in letters written by him to her employer, who was absent from his place of business and had left his affairs in her hands. Some of the expressions used in the letters in reference to the plaintiff were: "Call off your slut!" "Call off your carrion!" "Call off your dogs!" "If this woman controls you, body and soul, it's time I knew it:"—

Held, that the words should be interpreted in their plain and popular meaning, according to the ordinary usage of society.

The effect of the decisions is correctly stated in Halsbury's Laws of England, vol. 18, paras. 1211 to 1215.

2. In their plain and popular meaning, the statements complained of, as a whole, were capable of a defamatory meaning.
3. They were not capable of being understood as imputing unchastity or immoral conduct to the plaintiff; and the trial Judge should have so directed the jury, instead of which he misdirected the jury by, in effect, telling them that the words were capable of being so understood; *MAGEE, J.A.*, dissenting.
4. It was open to the defendant to complain in the appellate Court of this misdirection, notwithstanding that no objection to the charge was taken at the trial.
5. *Per Curiam*:—There should be a new trial on the ground that the damages were assessed by the jury at an excessive amount (\$15,000).

APPEAL by the defendant from the judgment of *MASTEN, J.*, at the trial, upon the verdict of a jury, in favour of the plaintiff, for the recovery of \$15,000 damages, in an action for libel.

The alleged libel was contained in three letters written by the defendant, two of them to one Masters, the plaintiff's employer, and the third to the plaintiff herself.

Masters being absent, the defendant had transacted business with the plaintiff, acting for Masters. The defendant felt aggrieved at the way in which he was being treated by the plaintiff, and in writing a letter of complaint to Masters used the following expressions: "Call off your slut!" "Call off your carrion!" "Call off your dogs!" "If this woman controls you, body and soul, it's time I knew it." The other letters contained strong language about the plaintiff.

The trial Judge withdrew from the consideration of the jury the letter to the plaintiff, except as evidence of malice. He also in effect ruled and directed the jury that the other letters might be read as imputing unchastity and immoral relations to the plain-

tiff, and that it was for them to say whether or not that was the meaning to be given to the letters.

The appeal was on two grounds: (1) that the trial Judge should have ruled that the letters were not defamatory, and should have dismissed the action; (2) that the damages were excessive.

March 21. The appeal was heard by MEREDITH, C.J.O., GARROW, MACLAREN, MAGEE, and HODGINS, JJ.A.

I. F. Hellmuth, K.C., for the appellant, argued that the learned trial Judge had erred in not charging the jury that the words complained of did not convey the implication that the defendant was a woman of immoral character; and also took the ground that the damages were grossly excessive. The following authorities were referred to: *Capital and Counties Bank v. Henty* (1880-1882), 5 C.P.D. 514, 7 App. Cas. 741; *John Leng and Co. Limited v. Langlands* (1916), 32 Times L.R. 255; *Ward v. McBride* (1911), 24 O.L.R. 555; *Odgers on Libel and Slander*, 4th ed., p. 64; *Macdonald v. Mail Printing Co.* (1900-1901), 32 O.R. 163, 2 O.L.R. 278; *Major v. McGregor* (1903), 6 O.L.R. 528; *Huber v. Crookall* (1886), 10 O.R. 475, 481; *Belt v. Lawes* (1884), 12 Q.B.D. 356; *Watt v. Watt*, [1905] A.C. 115; *Praed v. Graham* (1889), 24 Q.B.D. 53; *Dominion Telegraph Co. v. Silver* (1881), 10 S.C.R. 238; *Massie v. Toronto Printing Co.* (1886), 11 O.R. 362; *Pherrill v. Sewell* (1908), 12 O.W.R. 63.

Wallace Nesbitt, K.C. and *J. M. Godfrey*, for the plaintiff, the respondent, argued that the words used by the defendant could be understood as imputing immoral conduct to the plaintiff, and that the learned trial Judge was right in so directing the jury. They referred to *Odgers, op. cit.*, p. 683; *Townshend v. Hughes* (1677), 2 Mod. 150; *Hewlett v. Cruchley* (1813), 5 Taunt. 277; *Adams v. Coleridge* (1884), 1 Times L.R. 84. The placing of the word "slut" under the heading "Purity and Impurity" (962) in such a standard work as Roget's Thesaurus shews that it is capable of the interpretation alleged by the plaintiff. No objection to the charge was taken at the trial; it is not open to the appellant now to complain of misdirection.

Hellmuth, in reply, referred to *Nevill v. Fine Art and General Insurance Co.*, [1897] A.C. 68.

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April 3. MEREDITH, C.J.O.:—This is an appeal by the defendant from the judgment of Masten, J., dated the 15th November, 1915, which he directed to be entered on the verdict of the jury at the trial of the action before him at Toronto on that day.

The action is for libel alleged to be contained in three letters written by the appellant, one of them on the 6th and the other two on the 8th April, 1915.

The letter of the 6th April, part only of which is alleged to be libellous, and one of the letters of the 8th April, were written to W. B. Masters, the employer of the respondent, and the other on the 8th April to the respondent herself.

The letters of the 8th April and the part of the letter of the 6th April which is complained of are as follows:—

“Personal. Niagara Falls, Ont., April 8th, '15.

“W. B. Masters, Esq.,

“c/o. S. M. Stowenn,

“Alden, N.Y.

“Dear Sir: *Call off your slut!*

“Enclosed is a specimen of the ‘Beggar on Horseback’ letters I have been getting from the woman who exercises authority and issues her mandates and demands in your stead while you rest in modest retirement. I ask you to return it.

“*Call off your carrion!*—And this while I am on the broad of my back, but I ask no quarter on that account.

“If you are in your senses, as I take you to be, and are cognizant of this woman’s doings and permit them, let me warn you that I will not pay either of these notes under pressure, and if costs are incurred I will hold you to the extent of your responsibility in all directions. I ask you to declare yourself. I have waited three months without disturbing you. I will wait no longer. *Call off your dogs!*

“My two notes were dealt with in the usual manner, understood between us, at their maturity in March last, and with the usual reasonable reductions. Your attorney refused to renew, arbitrarily as I believe. If this woman controls you, body and soul, it’s time I knew it.

“*Call off the slut.*

“Yours truly,

“J. H. Stuart.”

"Personal and General. Niagara Falls, Ont., April 8th, '15.

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"Dear Madam:—Your various communications shew you to be a very ill-mannered woman. I found them very offensive, and their general tone would indicate that it must indeed be seldom your privilege to address a gentleman (or better still an honest man).

"Your criticism of my motives and actions is ludicrous, while of course grossly impertinent. Your threats concerning 'Head Office' are vulgar and impotent, and I could desire no better compliment than your complete and unreserved condemnation.

"Let the above recognition be your reward. I feel it to be your due.

"Yours truly,

"J. H. Stuart.

"P.S.—Do you know the *penalty* for destroying that voucher receipt?"

Extract from letter of the 6th April, 1915:—

"From the moment of your departure, your attorney, as I told her, dealt with your affairs as if you were a bankrupt or an insolvent, grabbing everything in sight and not depositing a dollar, even of moneys pledged to come to us. . . . To conclude, our bank and staff have had forced upon them much disagreeableness and several sharp practices at the hands of Mr. Symmes' representatives."

The learned trial Judge withdrew from the consideration of the jury the letter to the respondent of the 8th April "as a separate and independent libel," but apparently let it go to the jury as evidence of malice. He also in effect ruled and directed the jury that the other letters might be read as imputing unchastity and immoral relations to the respondent, and that it was for them to say whether or not that was the meaning to be given to them.

The jury found for the respondent, and assessed the damages at \$15,000, which was \$5,000 more than was claimed in her statement of claim; whereupon, by leave of the trial Judge, the statement of claim was amended by increasing the claim to \$15,000, and judgment was directed to be entered for the respondent for that sum with costs.

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The appeal is on the grounds that the trial Judge should have ruled that the letters were not defamatory and dismissed the action, and that the damages are excessive.

The respective functions of Judge and jury in libel actions are well settled and clearly defined, and the effect of the decisions is stated, and correctly stated, in Halsbury's Laws of England, vol. 18, pp. 652, 653, 654, 655, paras. 1211 to 1215 both inclusive, to be that:—

"1211. In construing the words complained of, in order to see whether the plaintiff has made out a case to be left to the jury, the Judge must, where nothing is alleged to give the words an extended sense, consider the statement as a whole, and interpret the words in their plain and popular meaning. If the words so interpreted are reasonably calculated to defame the plaintiff, he must leave it to the jury to say whether they did, in fact, defame him; if not, he must give judgment for the defendant without leaving the case to the jury.

"1212. Where there is an innuendo or something is alleged to give the words a sense which differs from their plain and popular meaning, the Judge must consider not merely the statement complained of, and the context in which it appears or was made, but he must also take into account the manner and occasion of the publication, the persons to whom it was published, and all other facts which are properly in evidence as affecting the meaning of the statement in the circumstances of the particular case.

"If the Judge, interpreting the statement in the light of the circumstances of the particular case, is satisfied that the words are capable of the meaning ascribed to them by the innuendo, he must leave it to the jury to say whether the statement in fact conveyed the meaning ascribed to it. If he is not so satisfied, it is his duty not to leave the question raised by the innuendo to the jury.

"But the Judge, in determining whether the words are capable of the meaning assigned, ought not to take into account mere conjectures which a person to whom the statement is published might possibly though unreasonably form.

"1213. Where the words in their natural meaning are not defamatory or actionable *per se* (as the case may require), the

plaintiff must at the trial satisfy the Judge of the existence of circumstances which lead to the conclusion that the words might reasonably convey the meaning assigned by the innuendo to persons to whom they were published, and if the plaintiff fails to do so, there is no case to go to the jury, and judgment should be entered for the defendant.

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"If in such a case the Judge leaves the decision of whether or not the words did convey the meaning assigned to persons to whom they were published, the Court of Appeal will give judgment for the defendant. In the Court of Appeal the burden is not on the defendant to shew that the words were incapable of the meaning assigned; it is sufficient for him to shew that the plaintiff did not discharge the burden which was on the plaintiff.

"1214. The defendant is always entitled to have the question of libel or no libel, slander or no slander, left to the jury, and if he can get either the Judge or the jury to be in his favour he succeeds; whereas the plaintiff, or the prosecutor, in criminal proceedings for libel, cannot succeed unless he gets both the Judge and the jury to decide in his favour.

"1215. The proper course for the Judge to adopt in civil or criminal proceedings for libel, where there is a case to go to the jury, is to define what is a libel in point of law, and leave it to the jury to announce their opinion as a matter of fact whether the particular publication falls within that definition or not. The Judge may as a matter of advice express his own opinion as to the nature of the particular publication, but he is not bound to do so as a matter of law, and it would be wrong for the Judge to direct the jury positively that they must find that a particular publication is a libel or a slander."

What is referred to in para. 1211 as "the plain and popular meaning" of the words is by some Judges called "their proper and natural meaning, according to the ordinary rules for the interpretation of written instruments:" *per* Lord Selborne, L.C., in *Capital and Counties Bank v. Henty*, 7 App. Cas. 741, 744; by others, their "primary sense:" *per* Brett, L.J., in the same case, 5 C.P.D. 514, 542; and by other Judges, their "natural meaning:" *per* Lord Shand in *Nevill v. Fine Art and General Insurance Co.*, [1897] A.C. 68, 79.

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By "primary meaning" is not meant the etymological meaning, but that which the ordinary usage of society affixes: *per* Coleridge, J., in *Shore v. Wilson* (1839), 9 Cl. & F. 355, 527.

In the case at bar there were three questions which fell to be determined by the trial Judge:—

(1) Whether, in their plain and popular meaning, the statements complained of, as a whole, were capable of a defamatory meaning.

(2) Whether, if capable of a defamatory meaning, they were capable of being understood as imputing unchastity or immoral conduct to the respondent.

(3) Whether, if these two questions were answered in the negative, in the light of the circumstances of the case the words were capable of any of the defamatory meanings ascribed to them by the innuendoes, and, if so, of which of them they were so capable.

I agree with the contention of the respondent's counsel that the first question should be answered in the affirmative.

While, for the reasons I shall afterwards state, I do not think that the letters can be read as imputing unchastity or immoral conduct to the respondent, the application to her of the epithets "slut" and "carrion" was calculated to expose her to hatred, contempt or ridicule, as it tended to lower her in the opinion of her employer, to whom the letters were written, or to induce him to entertain an ill opinion of her.

As was said in an old case, *Bell v. Stone* (1798), 1 B. & P. 331, 332, "any words written and published, throwing contumely on the party," are actionable.

The case, therefore, could not have been withdrawn from the jury.

In dealing with the question whether the letters were capable of being read as imputing unchastity or immoral conduct to the respondent, it is necessary to consider the circumstances in which they were written. As I have said, the respondent was in the employment of Masters, and she had the charge and management of his business. He was in bad health, and had gone to the United States for medical treatment. He was a customer of the Niagara Falls branch of the Bank of Hamilton, of which the appellant was the manager, and had a credit there, but had over-

drawn it. He had business transactions with the appellant personally, who had given him two promissory notes on account of an indebtedness, and these notes were held by another bank, which had discounted them. Shortly after Masters left Canada, disputes arose between the appellant and the respondent, principally with reference to the application of moneys of Masters which the appellant contended should be applied to reduce the overdraft at his bank, but which the respondent insisted upon depositing in a trust account in another bank; and the relations between the two were certainly not friendly. What led up to the writing of the letters in question occurred later on. The two promissory notes to which reference has been made were about to mature, and the appellant had sent renewals of them to Masters to be endorsed by him. This appears to have given offence to the respondent, who thought it was highly improper that the appellant had dealt directly with her employer instead of with her, and she wrote to the appellant on the 6th April, 1915, telling him her opinion of his conduct in the matter, as well as in reference to a previous renewal of the notes, and expressing it in not very complimentary language. The letter also stated the conditions upon which alone the notes would be renewed, and with it were returned the two notes, which the appellant had sent to Masters. On receipt of this letter, the appellant wrote to Masters expostulating with him for sending the notes to the respondent and not dealing directly with him. In this letter, after referring to a power of attorney Masters had given to him, the appellant says: "But the bank's hands have been tied ever since by the appointment of an insolent and over-zealous woman, whom we have tolerated only because we thought you would soon return and in deference to a trusted customer."

Two days afterwards, the letter to Masters of the 8th April was written, and with it was sent the respondent's letter to the appellant of the 6th April.

In applying his mind to the question whether the letter of the 8th April was capable of being read as imputing unchastity or immoral conduct to the respondent, as I have said, it was proper for the learned trial Judge to consider the circumstances in which the letter was written and the matters with which it dealt.

It is clear that the purpose of the latter was to remonstrate

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with Masters against the course the respondent was taking with reference to the renewal of the notes, and that the appellant believed that he was being unfairly treated by her, and that she was, in the name of Masters, making and unduly pressing arbitrary demands upon him; and, fairly read, the request or demand to call off the respondent, though couched in vulgar and abusive language, means no more than this: "I am being hounded by your agent, call her off." In other words, "I am being pursued by her relentlessly and persistently, as dogs pursue game." "Call off your dogs." "Call off your slut."

It was argued by the learned counsel for the respondent that the expression, "if this woman controls you body and soul, it's time I knew it," suggests that there were immoral relations between the respondent and her employer. It is difficult for me to take the argument seriously, and when I heard it it brought to mind the address of counsel for the plaintiff in the celebrated case of *Bardell v. Pickwick*, reported only in Dickens's *Pickwick Papers*. What the expression plainly means is: "If this woman so entirely controls your actions that you are unable to deal with me directly, I want to know it."

If, however, the word "slut," as applied to the respondent, is not shewn by the context and the circumstances, as I think it is, to have been used in the sense I have just mentioned, a further inquiry is necessary, viz., what is the plain and popular meaning of the word "slut?" In no dictionary that I have been able to consult, and I have consulted the *Imperial*, the *Standard*, the *Century*, *Webster's*, and *Murray's*, except in *Murray's*, is a meaning implying lewdness, unchastity, or immorality given to the word. In *Murray's*, the second meaning given to it is "a woman of low or loose character, a bold or impudent girl, a hussy, a jade," and the authorities given for the use of the word in the sense of "a woman of low or loose character" are all, except one, writers of more than two centuries ago, and that one, Sheridan, writing in the latter end of the 18th century.

What I have said as to the *Standard* dictionary is subject to the observation that one of the meanings given to the word "sluttish" is "lewd, meretricious," but it is marked as obsolete.

One might as well argue that because the word "libertine" at one time meant "a freeman as of a corporate town," or because

"knave" in early English meant "a boy" or "any male servant," or because the word "villain" once meant a "country-man, peasant, or farm servant," the like meanings should be ascribed to those words when used in the present day, as to argue that, because two or three centuries ago the word "slut" was used by writers of that day as meaning "a women of low or loose character," that meaning should now be given to it.

I apprehend that the reason why some lexicographers give the old meanings of words is that it is thought desirable to provide keys for the interpretation of words which were in former times used by English writers of repute in a sense which they do not now bear, and to follow the historical method of dealing with words and their signification.

If I am right in thinking that the word "slut," interpreted according to its plain and popular meaning, cannot be read as imputing unchastity or immoral conduct to the respondent, it follows that the learned trial Judge should have so directed the jury; but, as it is alleged by the innuendo that the word was used in that sense, it was for him to consider not merely the statement complained of but the context in which it appears or was made; and "the manner of the publication, and the things relative to which the words are published, and which the person publishing knew, or ought to have known, would influence those to whom it was published in putting a meaning on the words, are all material in determining whether the writing is calculated to convey a libellous imputation. There are no words so plain that they may not be published with reference to such circumstances, and to such persons knowing these circumstances, as to convey a meaning very different from that which would be understood from the same words used under different circumstances:" *per* Lord Blackburn in *Capital and Counties Bank v. Henty*, 7 App. Cas. at p. 771.

And if, upon consideration of all these matters, the proper conclusion was that the words used were not capable of the meaning alleged in the innuendo, it was the duty of the trial Judge to have so directed the jury.

For the reasons I have already given in dealing with another branch of the case, I am of opinion that the words complained of were not capable of the meaning that the respondent was an unchaste or immoral woman, and that the learned trial Judge

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misdirected the jury in telling them, as he in effect did, that the words were capable of that meaning.

It was contended by Mr. Nesbitt that, as no objection was taken to the charge to the jury, it was not open to the appellant to object to it on the ground of this misdirection, but I am not of that opinion; and *St. Denis v. Shoultz* (1898), 25 A.R. 131, is a clear authority against the contention.

I am also of opinion that the damages are so excessive as to warrant interference with the finding as to them; they are, I think, so manifestly unreasonable that the jury must have been influenced by views and considerations to which they should not have given effect.

For these reasons, I would allow the appeal with costs, set aside the verdict and judgment, and direct that a new trial be had between the parties, without costs.

GARROW, MACLAREN, and HODGINS, JJ.A., concurred.

MAGEE, J.A.:—The amount awarded for damages in this case is excessive, and, while serving to mark the proper sense which the jury had of the defendant's conduct, cannot be said to bear any just relation either to the circumstances or station in life of the parties or to a proper punishment of the defendant or the actual injury sustained by the plaintiff; and I agree that there should be a new trial. But I cannot accede to the proposition made for the defendant that the case should go back to a jury with a declaration from this Court that the trial Judge was wrong, or that the jury must be told that the only construction to be placed upon the writing is in effect that, because of her zeal in diligent attention to her employer's interests and in carrying out his instructions, the plaintiff was merely figuratively alluded to by his debtor as a hunting dog, with a purely proper and necessary change of gender, or that she is only entitled to damages for such a comparatively uninjurious reference, and as if the defendant had playfully written to a client of a collecting agency, "Call off your dogs." The defendant himself was not satisfied with that phrase, which he actually used.

I do not propose to enter upon any philological inquiry as to the origin or use of the expression which, with "carrion,"

the defendant chose to apply to a respectable young woman. Fortunately, our modern dictionaries are not given to the perpetuating of many words and meanings which do not commend themselves to modern refinement but have yet a very vigorous life in the community—but it is noticeable that the innocent zoological sense which is pressed upon the Court for the defendant is given in some dictionaries as not of English but American use—while there is no doubt in what classes the word is placed in so recent (1888) a work as Roget's Thesaurus, where that sense does not appear at all. If a person chooses to select for its abusive character and apply to another an expression which has, amongst others, a most opprobrious meaning, it does not lie in his mouth to ask that the jury be told they must read it as having been used only in one of its possible significations.

That the defendant had not the slightest justification for using a term which might impute misconduct to the plaintiff is no ground for holding that the jury must find that he did not intend such an imputation, or that he would not in his then frame of mind have enjoyed its acceptance in its most objectionable sense. In my opinion, it would have been misdirection on the part of the trial Judge to have told the jury that the defendant's letter was not reasonably capable of the meaning charged, and I also regretfully have to admit that my experience has not led me to believe that as a fact the most discreditable meaning is quite so obsolete as has been contended.

New trial ordered.

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Constitutional Law—Roman Catholic Separate Schools—5 Geo. V. ch. 45 (O.)—Intra Vires—Suspension of Right of Trustees to Manage Schools—"Right or Privilege with Respect to Denominational Schools"—Legislation Prejudicially Affecting—British North America Act, 1867, sec. 93 (1)—Rights of Minority of Separate School Supporters—Remedy—Forum.

The only "right or privilege with respect to denominational schools" (British North America Act, sec. 93 (1)) which the Roman Catholics had by law in the Province of Ontario at the Union was the right or privilege, so long as a system of compulsory free primary education existed, to establish, man-

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age, and maintain Separate Schools for the education of their children and to be exempt from contributing to the support and maintenance of the Common Schools while they continued to be supporters of the Separate Schools. The "Act respecting the Board of Trustees of the Roman Catholic Separate Schools of the City of Ottawa," 5 Geo. V. ch. 45, does not, within the meaning of sec. 93 (1), prejudicially affect any right or privilege with respect to denominational schools which the class of persons called Roman Catholics had by law at the Union, and is *intra vires*. All that is done by the Act is to suspend the right of a particular body of persons of the class to manage its schools, because it persistently refuses to obey the law and insists upon managing them contrary to law and in open defiance of it.

Review of the legislation respecting Separate Schools in Upper Canada and Ontario.

Judgment of MEREDITH, C.J.C.P., 34 O.L.R. 624, affirmed.

Semble, per MAGEE, J.A., having regard to the four provisions of sec. 93 of the British North America Act, subject and according to which a Provincial Legislature may exclusively make laws in relation to education, that the only relief from a Provincial law prejudicially affecting rights or privileges with respect to denominational schools, was intended to come from the Provincial Legislature itself, or, failing that, then from the High Court of Parliament; and it was not intended that every change in the law should be brought before Courts of law for the purpose of obtaining a decision whether a class of persons had been prejudicially affected.

APPEALS by the plaintiffs from the judgment of MEREDITH, C.J.C.P., 34 O.L.R. 624.

March 20. The appeals were heard by MEREDITH, C.J.O., GARROW, MACLAREN, MAGEE, and HODGINS, JJ.A.

A. C. McMaster, for the appellants, argued that the legislation in question was *extra vires* of the Legislature of Ontario, inasmuch as it prejudicially affected the rights enjoyed with respect to denominational schools by Roman Catholics in Upper Canada at the time of the passing of the British North America Act in 1867, contrary to the provisions of sec. 93 (1) of that Act. He referred to *Brophy v. Attorney-General of Manitoba*, [1895] A.C. 202; *City of Winnipeg v. Barrett*, [1892] A.C. 445; *Ashby v. White* (1703), Sm. L.C., 11th ed., vol. 1, p. 240.

W. N. Tilley, K.C., for the defendants the Ottawa Separate School Commission, respondents, argued that there was nothing in the Act appointing the Commission which had any prejudicial effect on the rights of the Roman Catholics of this Province with respect to education. It merely affected the machinery by which these rights were secured, and prevented the trustees from disobeying and disregarding the authority to which they were legally subject. The *Barrett* case is an authority for the validity of such legislation.

A. R. Clute, for the defendants the Corporation of the City of Ottawa, respondents.

J. D. Bissett, for the defendants the Quebec Bank, respondents.
J. A. McEvoy, for the Attorney-General for Ontario.

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April 3. MEREDITH, C.J.O.:—These are appeals by the plaintiffs from the judgment dated the 18th November, 1915, which was directed to be entered by the Chief Justice of the Common Pleas, after the trial of the action before him sitting without a jury at Ottawa on the previous 13th day of October; and the reasons for judgment are reported in 34 O.L.R. 624.

The sole question for decision is as to the validity of an Act of the Legislature of this Province passed on the 8th day of April, 1915, intituled "An Act respecting the Board of Trustees of the Roman Catholic Separate Schools of the City of Ottawa," 5 Geo. V. ch. 45.

The contention of the appellants is, that this Act contravenes the following provision of sec. 93 of the British North America Act:—

"93. In and for each Province the Legislature may exclusively make laws in relation to education, subject and according to the following provisions:—

"1. Nothing in any such law shall prejudicially affect any right or privilege with respect to denominational schools which any class of persons have by law in the Province at the Union."

Prior to and at the time of the passing of the Act in question, the Separate Schools of Ottawa were under the management of the appellants, who are a corporation created and existing under the authority of the Separate Schools Act, R.S.O. 1914, ch. 270, or the Acts which were consolidated in that Act.

Questions having arisen as to the validity of two regulations made by the Minister of Education as to the teaching of the French language in the Public and Separate Schools of the Province, regulation number 17 of 1912 and regulation number 17 of 1913, as they are called, an action was brought by a supporter of the Separate Schools in Ottawa named Mackell, on behalf of himself and other supporters of these schools, for the purpose of obtaining a declaration that these regulations were "*ultra vires* the Province under the British North America Act, and that the Province had no legislative authority under that Act to regulate the use of French as a language of instruction and communication in the

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Public and Separate Schools of the Province or the teaching therein of the French language;”* and pending that action the Act in question was passed.

The preamble to the Act recites the bringing of the action and its objects; that the appellants had failed to open the schools under their charge at the time appointed by law or to pay qualified teachers for the schools and had threatened at different times to close the schools and to dismiss the qualified teachers duly engaged for them; and that the statements of the preamble were true was admitted by counsel for the appellants at the trial.

By the first section it is declared that, subject to the question of the legislative authority of the Province under the British North America Act which I have mentioned, the regulations that were questioned were duly made and approved under the authority of the Department of Education and became binding according to their terms and provisions upon the appellants and the schools under their control.

By sec. 2, certain duties in respect of the schools under the control of the appellants are imposed upon the Board of Trustees of the Roman Catholic Separate Schools for the City of Ottawa (the appellants) and the members thereof.

The duties which were thus imposed were already imposed by the Separate Schools Act, and sec. 2 was but an affirmance of the provisions of that Act as to the matters with which sec. 2 deals.

By sec. 3 it is provided that:—

“If, in the opinion of the Minister of Education, the said Board fails to comply with any of the provisions of this Act, he shall have power, with the approval of the Lieutenant-Governor in Council—

“(a) To appoint a commission of not less than three nor more than seven persons;

“(b) To vest in and confer upon any commission so appointed, all or any of the powers possessed by the Board under statute or otherwise, including the right to deal with and administer the rights, properties and assets of the Board and all such other powers as he may think proper and expedient to carry out the object and intent of this Act;

*See *Mackell v. Ottawa Separate School Trustees* (1915), 34 O.L.R. 335.

"(c) To suspend or withdraw all or any part of the rights, powers and privileges of the Board, and whenever he may think desirable to restore the whole or any part of the same and to revest the same in the Board;

"(d) To make such use or disposition of any legislative grant that would be payable to the said Board on the warrant of any inspector for the use of the said schools or any of them as the Minister may in writing direct."

And the provisions of sec. 4 are that:—

"Nothing in this Act shall be construed to relieve the Board or any of its members from the discharge and performance of any duties imposed upon it or them by law or by any judgment in the said action, or from any liability to any supporter of the said schools or other person interested that has been or may be incurred by reason or on account of the failure or neglect of the Board or any of its members to discharge or perform any of the said duties."

The result of the action of Mackell was that it was determined that the Legislature had the authority which was challenged, and that the regulations in question were valid, and the action was dismissed.

After the dismissal of the action, the acting Minister of Education decided that the appellants had failed to comply with the provisions of the Act, and, with the approval of the Lieutenant-Governor in Council, put into execution the powers conferred upon the Minister of Education by sec. 3, and the respondents the Ottawa Separate School Commission are the Commission appointed under the provisions of the section.

The argument of the appellants' counsel is based on the proposition that at the time of the Union it was the right or privilege of Roman Catholics to establish Separate Schools for the education of their children; to control and manage these schools by means of Boards of Trustees elected by themselves; and to have for the support of them a share of the public grants for public school purposes, ascertained in the manner provided by the Separate Schools Act; and that the Act in question prejudicially affects this right or privilege, because it takes from the supporters of the Roman Catholic Separate Schools in Ottawa the right to control and manage their schools through the medium

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of their elected representatives, and vests the control and management of them in a Commission appointed by the Crown.

A brief reference to the history of the legislation as to public elementary instruction or common school education and the genesis of the Roman Catholic Separate School will, I think, assist in reaching a conclusion as to the question involved in the present litigation.

At the time of the Union of the Provinces by the British North America Act, the law relating to Separate Schools in Upper Canada (now Ontario) was contained in the Act 26 Vict. ch. 5, which came into force on the 31st December, 1863.

Prior and up to the time of the passing of this Act, there had been bitter controversies on the subject of Roman Catholic Separate Schools, the policy of engrafting on the Common School system provision for the separate education of the children of Roman Catholics being vigorously opposed by a large part and probably a considerable majority of the people of Upper Canada, and the right to this separate education being as vigorously demanded by the Roman Catholic minority.

Provision for the establishment of these Separate Schools was made in the School Law of 1841, 4 & 5 Vict. ch. 18, the first of such laws passed after the union of the Provinces of Upper and Lower Canada, and in the School Laws passed between 1841 and 1863: 7 Vict. ch. 9, 12 Vict. ch. 83, 13 & 14 Vict. ch. 48, 14 & 15 Vict. ch. 111, 16 Vict. ch. 185, 18 Vict. ch. 131.

These provisions varied from time to time the privileges of Roman Catholics as to the establishment, control, and maintenance of the schools. Sometimes they were enlarged beyond those conferred by the School Law of 1841, and sometimes they were abridged; and it was in consequence of the existing legislation having abridged the privileges conferred by previous legislation that the Act of 1863 was intituled "An Act to restore to Roman Catholics in Upper Canada certain rights in respect to Separate Schools," and that its preamble recited that "it is just and proper to restore to Roman Catholics in Upper Canada certain rights which they formerly enjoyed in respect to Separate Schools." It is important also to notice the remainder of the recital: "and to bring the provisions of the law respecting Separate Schools more in harmony with the provisions of the law respecting Common Schools."

The ground upon which was based the claim of the Roman Catholics to Separate Schools was the injustice of compelling them to contribute to the support of schools to which, owing to the character of the instruction given in them, they could not for conscientious reasons send their children, because in their view it was essential to the welfare and proper education of their children that religious instruction according to the tenets of the Roman Catholic Church should be imparted to them as part of their educational training.

This injustice, it was claimed, was greatly aggravated when, by the School Law of 1850, a system of compulsory free primary education in schools, supported partly by Government grants, but mainly by taxation, to which all ratepayers were liable, was established.

The Act of 1863 provided for the establishing and maintenance of Roman Catholic Separate Schools, which were, with their registers, to be subject to such inspection as might be directed from time to time by the Chief Superintendent of Education, and to such regulations as might be imposed from time to time by the Council of Public Instruction for Upper Canada.

The initial step for bringing into existence a Roman Catholic Separate School was the convening, by not less than five heads of families, being freeholders or householders resident within any school section of any township, village, or town, or within any ward of a city or town, and being also Roman Catholics, of a meeting of persons desiring to establish a Separate School for Roman Catholics in the school section or ward, for the election of trustees for the management of the school. A majority of the persons present at the meeting thus convened, being freeholders or householders and Roman Catholics, were authorised to elect trustees for the management of the school; and, after the trustees had been elected and certain formalities had been complied with, the trustees became a body corporate.

The support of these schools depended upon the voluntary action of the Roman Catholic ratepayer, and provision was made as to the manner in which his intention to be a supporter of the Separate School was to be signified, and provision was also made for the manner in which a supporter of the school might withdraw from it his support.

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Provision was also made that every Separate School should be entitled to share in the fund annually granted by the Legislature for the support of Common Schools, and in all other public grants, investments, and allotments for Common School purposes then or thereafter made by the Province or the municipal authorities on the basis of school attendance.

The provisions of the Common School Act relating to the mode and time of election, appointments and duties of chairman and secretary at the annual meetings, term of office and manner of filling up vacancies, were made applicable, and the trustees were to perform the same duties and be subject to the same penalties as trustees of Common Schools, and the teachers were to be liable to the same obligations and penalties as teachers of Common Schools.

The trustees were empowered to impose, levy, and collect school rates or subscriptions upon and from persons sending children to or subscribing towards the support of the school, and were invested with all the powers in respect of Separate Schools which the trustees of Common Schools had and possessed under the Common School Acts; and the Act contained other provisions to which, for the purpose of the present inquiry, it is unnecessary to refer.

It will be seen from this summary of the main features of the Act that the Roman Catholic Separate Schools were part of the Common School system of the Province, and as much Common Schools as those schools which bore that name. The terms "Common School" and "Roman Catholic Separate School" or "Separate School" were adopted as a convenient mode of distinguishing between the two classes of Common Schools; and they were all State Schools, the Separate Schools as well as the Common Schools.

Having regard to these facts and the course of the legislation, it is clear, I think, that the only right or privilege with respect to denominational schools which the Roman Catholics had by law in this Province at the Union was the right or privilege, so long as a system of compulsory free primary education existed, to establish, manage, and maintain Separate Schools for the education of their children and to be exempt from contributing to the support and maintenance of the Common Schools while

they continued to be supporters of the Separate Schools; and I agree with the trial Judge that, if it should ever become the policy of the Province to abolish the existing system of primary education—I mean by that the system of State Schools—it would be competent for the Legislature to repeal the Separate School Law without contravening the provisions of sec. 93 of the British North America Act.

However, be that as it may, I am of opinion that the Act in question does not, within the meaning of sec. 93 (1), prejudicially affect any right or privilege with respect to denominational schools which the class of persons called Roman Catholics had by law at the Union.

The right or privilege which that class, as a class, had at the Union, is not prejudicially affected by the legislation, or even interfered with. All that is done is to suspend the right of a particular body of persons of the class to manage its schools, because it persistently refuses to obey the law and insists upon managing them contrary to law and in open defiance of it.

The right or privilege which the Act of 1863 conferred upon Roman Catholics and the persons chosen by them to carry on and manage their schools was not to manage and conduct them according to their own will and pleasure, but only to do so in accordance with the law and the regulations; and, in my opinion, a body of Roman Catholics which is managing and conducting its schools as the appellants were doing, and insisted upon doing, is not exercising any right or privilege which sec. 93(1) was intended to preserve; and it would be, in my judgment, an extraordinary thing if the Legislature were powerless to intervene and to put an end to the state of things which existed and was the moving cause for the enactment of the legislation in question.

It is in the highest interest of the State that its children should be educated, and it cannot surely be, when the body whose duty it is to provide for that education and to carry on the schools under its charge abnegates its functions, refuses to perform its duties, and insists upon carrying on the schools not in disregard only, but in defiance of, the law, that it cannot be displaced and the powers and duties which it should have exercised and performed be vested in a body which is willing and able to obey the law and to provide the needed instruction for

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the children whose welfare is jeopardised by the action of the unfaithful stewards to whom the Legislature has committed the care of their education. It is, to my mind, a monstrous proposition that the effect of sec. 93(1) is that the State, whose creature the appellants and the schools under their charge are, is powerless to act where a body it has created flouts its authority and disobeys its laws.

It was argued that the remedy which the Legislature has applied is too drastic, and that, if the members of the present Board are disobeying the law, there are means by which they can be removed from office and others be elected in their stead. The alternative suggested would, in the circumstances, be no remedy at all. It is not only the members of the Board or a majority of them that defy the law; they are supported in their action by a majority of their constituents; and to remove them from office would only result in the election of another set of men which would follow the course they have taken.

The contention of the appellants' counsel ignores the fact that the minority of the Board and of the ratepayers is desirous of obeying the law and conducting the schools in accordance with it, and the further fact that the minority of the supporters of the schools, owing to the action of the appellants, are deprived of the privilege the enjoyment of which is guaranteed to them by sec. 93 (1), and that one of the purposes and the effect of the legislation in question is to enable them to enjoy that privilege.

For these reasons, I am of opinion that the actions of the appellants were rightly dismissed, and that the appeals should be dismissed with costs.

GARROW, MACLAREN, and HODGINS, JJ.A., concurred.

MAGEE, J.A.:—Fully concurring in the reasons and conclusion of my Lord the Chief Justice and in the dismissal of the appeals and actions, I merely desire to say that it is not necessary in this case, nor has it been in any of the recent cases relative to these Ottawa Schools necessary, to decide that it was ever intended in the British North America Act that the question of the prejudicial effect of legislation in any Province upon the

existing rights or privileges of any class as to education or the validity or invalidity of such legislation in that respect should be dealt with by the Courts of law—or otherwise than in the mode provided in the third and fourth provisions of sec. 93 of that Act.

I see no reason to believe that the Imperial Parliament intended that the subject of education should be less fully and completely within the control of some legislative body or bodies in the new Dominion than any of the many other subjects which had to be distributed between the Provincial and Federal jurisdictions, or that any residuum of legislative power on that subject, more particularly than others, was intended to be withheld for exercise only in the United Kingdom. Within the vertical lines of division, as full powers were conferred upon the respective legislative bodies as were possessed by the Imperial Parliament itself. No ground presents itself to me on which to base a supposition that the new Union and its component parts were not considered fully capable of doing justice to all its citizens as much with regard to education as to trade, marriage, or civil rights.

If such full power was conferred, it must have been placed somewhere; and, wherever placed, it must be absolute and cannot be questioned by any tribunal. Where then does it rest? By sec. 92, exclusive power was given to the Provincial Legislatures upon the various subjects therein mentioned, that of education not being alluded to. By sec. 91, certain other specified subjects, not including education, were assigned exclusively to the Dominion Parliament, and also power to make laws in all matters not coming within the "classes of subjects" assigned exclusively to the Provincial Legislatures—as to none of these subjects specified in secs. 91 and 92 was there any restriction or appeal. Then education is dealt with separately in sec. 93, which opens like sec. 92 by saying that in each Province "the Legislature may exclusively make laws" in relation thereto, but adds, "subject and according to the following provisions," which are four in number.

That section, 93, is the only one relating to education, and, if full power was intended, as I think it was, to rest somewhere in Canada, and was not wholly conferred upon the Province,

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we must look for the unconferrd part as being placed in the Dominion somewhere in the Act. Section 91, as already mentioned, does give to the Dominion Parliament authority in relation to all matters not coming within the "classes of subjects" "assigned exclusively" to the Provinces, but education is assigned exclusively to the Legislatures, though subject and according to certain provisions, but not with any exceptions. It would thus appear that not under sec. 91, but within the four provisions of sec. 93, is to be found the only power given to the Dominion Parliament with regard to education. Outside of whatever is given to the Dominion Parliament, the power of the Provincial Legislature must be absolute, if absolute power was transferred to this side of the Atlantic.

The first of the four provisions declares that nothing in any such Provincial law shall prejudicially affect any right or privilege with respect to denominational schools which any class of persons had by law in the Province at the time of the Union. The second provision extends to dissentient schools in Quebec, the powers, privileges, and duties of the Roman Catholic Separate Schools and School Trustees in Upper Canada—and incidentally these plaintiffs might take notice that duties as well as privileges attached to them. Then the third and fourth provisions shew what may happen if the first provision is not lived up to by the Provinces. The third gives an appeal to the Governor-General in Council from any Act or decision of a Provincial authority affecting any right or privilege of a Protestant or Roman Catholic minority in relation to education in any Province, where there or thereafter a system of separate or dissentient schools exists. And the fourth and last provision is that, if the decision on such appeal is not duly executed by the Provincial authorities, or in case any such Provincial law as from time to time to the Governor-General in Council seems requisite for the due execution of the provisions of sec. 93, is not made, the Parliament of Canada may make—what?—remedial laws for the due execution of the provisions of the section and of any decision of the Governor-General in Council.

This remedial power is the only power given to the Dominion, and it is given only in case the Province itself fails to supply the remedy. But remedial laws, whether of the Province or the

Dominion, imply that the law or state of affairs to be remedied is in force or actual existence, not that it is invalid or non-existent. This qualification that the Dominion may make remedial laws, on the refusal of the Province, would seem to be the only qualification of absolute power in the Province, and would seem to imply absolute power if the qualification never takes effect.

Moreover, as the British North America Act gives the appeal against the infringement of the rights which it creates, it would appear from the broad and general nature of the subject, involving matters of high policy and liberal, generous, and wise treatment of minorities, which should not be the subject of technical construction, that the words of Lord Herschell in *Barraclough v. Brown*, [1897] A.C. 615, might well apply. At p. 620 he said: "I do not think the appellant can claim to recover by virtue of the statute, and at the same time insist upon doing so by means other than those prescribed by the statute which alone confers the right." And see also *Pasmore v. Oswaldwistle Urban District Council*, [1898] A.C. 387.

It appears to me, therefore, that it may well be open to argument that the only relief ever intended from a Provincial law prejudicially affecting rights or privileges as to denominational schools, was intended to come from the Provincial Legislature itself, or, failing that, then from the High Court of Parliament itself; and that it is not open to have the validity of every change in the law, however trifling or local, in a matter affecting what are, after all, though in a sense state schools, as purely voluntary as joint stock companies or societies, from which members may at any time withdraw, brought before Courts of law in various places to decide, perhaps without adequate evidence, whether a great class throughout the Province is prejudicially affected.

In *City of Winnipeg v. Barrett*, [1892] A.C. 445, 5 Cart. 32, the Privy Council considered that under the Manitoba Act such questions could be dealt with by the Courts. But it may be that Manitoba powers, being carved out of the Dominion powers, might be considered more restricted than those which were merely the subject of rearrangement of the powers of independent Provinces at Confederation.

In *Brophy v. Attorney-General of Manitoba*, [1895] A.C. 202,

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a question had been submitted to the Court by the Governor-General in Council. In *Ex p. Renaud* (1873), 1 Pugsley (N.B.) 273, 2 Cart. 445, the New Brunswick School Act of 1871 was held valid, though the Court assumed it was their right and duty to deal with such questions. In *Belleville Separate School Trustees v. Grainger* (1878), 25 Gr. 570, 1 Cart. 816, changes in the Ontario Separate School law were held valid by Blake, V.-C., who pointed out that no appeal to the Governor-General in Council had been made.

However, these actions fail, without our having to consider that question.

Appeals dismissed with costs.

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[IN CHAMBERS.]

April 4.

RE CLARKE.

Infants—Custody—Abandonment by Mother—Adoption by Foster-parents—Adoption Agreements Made by Father—Application by Parents for Custody—Infants Act, R.S.O. 1914, ch. 153, sec. 3—Common Law Right—Conduct of Father Precluding Assertion of, in Equity—Interest of Infants—Rights of Foster-parents—Compensation.

The father of an infant cannot make a binding adoption agreement: the changes in the statute-law embodied in sec. 3 of the Infants Act, R.S.O. 1914, ch. 153, have not altered the law in this respect.

Re Hutchinson (1912-13), 26 O.L.R. 601, 28 O.L.R. 114, followed.

The father, however, may (in equity) by his conduct preclude himself from asserting his natural and common law right.

In re Agar-Ellis (1878), 10 Ch. D. 49, 72, *In re Agar-Ellis* (1883), 24 Ch. D. 317, 333, and *In re Scanlan* (1888), 40 Ch. D. 200, followed.

Where the mother of two infants of tender years abandoned them, whereupon the father placed them in foster-homes, making adoption agreements in good faith with the foster-parents, and the foster-parents had the care of the children for a considerable time, fully lived up to their part of the bargain, and not only incurred expense but nurtured the children at a time when such care was most needed, at the request of the father, it was held, that he should not, against the interest of the children, be permitted to resume the custody of them merely for the purpose of handing them over to the mother; and, if the mother had any independent right, her abandonment of the children precluded her from asserting it.

Seemle, that, if the custody of the children were awarded to the parents, it would be upon payment of a substantial sum for the expenses of the foster parents.

MOTION by Arthur Clarke and his wife, the father and mother of two infants, Annie May Clarke, three years old, and Beatrice Catharine Clarke, fifteen months old, for an order for their custody, they being in foster-homes.

March 31. The motion was heard by MIDDLETON, J., in Chambers.

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A. L. Baird, K.C., for the father and mother.

H. J. Scott, K.C., for the foster-parents in each case.

April 4. MIDDLETON, J.:—Arthur Clarke, the father of the infants in question, is a young Englishman, who is now enlisted as a private soldier. Before enlisting, he worked in a factory at Port Elgin. His wife, also born in England, was, before her marriage, a factory-hand. They married on the 19th August, 1911, and these young children are the sole issue of the marriage; the elder about three years old, and the younger a year and three months.

In April, 1915, when the younger child was about four months old, the mother left her husband and children. This child was not then weaned, and the leaving of the children by the mother was, I think, nothing short of deliberate desertion. The father, left with these two children and no relatives to assist him, not knowing where his wife was, succeeded in making arrangements for the adoption of the children by the foster-parents who are respondents to this motion. In each case he seems to have fortunately secured a good home for the child, and the foster-parents have fulfilled their obligations to the children to the utmost. The children are well cared for, well fed, well clothed, and happy, and it is conceded that, so far as the children themselves are concerned, there is nothing either calling for or justifying any change in their environment.

At the time of the desertion, it is probably true that the mother was not in good health. She went to London, Ontario, stayed with a friend there for a while, then worked for this friend as a domestic to repay her; then she took employment as a nurse for a while, and again as a waitress in a restaurant; finally returning to Port Elgin, where her husband was, in August, 1915; then for the first time learning of the fate of her abandoned children. She has been permitted by the foster-parents to see the children; and ultimately, in December, she, through her solicitor, demanded custody of the children. In the meantime, her relations with her husband were none too pleasant. She seems to have been jealous and to have made accusations of

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misconduct against him; and the quarrelling, which had been frequent before the desertion, seems to have continued after her return. The wife on one occasion stabbed the husband in the course of a quarrel; and she consulted a magistrate with a view to compelling him to maintain her. The husband finally made up his mind to enlist, and it is expected that he will shortly leave for Overseas.

When the wife first desired to obtain possession of the children, the husband appears to have thought that they ought to remain with the foster-parents. He has now changed his view, and sides with the wife, joining with her in the making of this application.

The father, of course, does not himself seek to have the custody of the children, but he desires now, he says, to leave them with his wife. He is assigning to her some portion of his pay, and if she is in custody of the children she will receive an additional allowance, it is said, of \$10 per month for their maintenance. The parents are now living in two rooms, in a house occupied in all by five families, and this is the home to which it is proposed that these two little girls should be brought from their respective foster-homes.

The motion is really based on what is supposed to be the father's absolute right to the custody and control of his children. He executed, at the time of the adoption, two separate agreements, under seal, reciting that his wife had abandoned him and the children, leaving his home without just cause, and he relinquished his right as father to the possession of the children to the foster-parents, promising not to interfere with their possession; the foster-parents on their part covenanting for the due upbringing of the children without expense to the father.

It may be conceded that at common law such an agreement would not be binding upon the father; but this does not, I think, by any means conclude the matter.

Mr. Scott argued that our present statute respecting infants, R.S.O. 1914, ch. 153, sec. 3, is far wider than the statute 12 Car. II. ch. 24, and gives to the father the right by deed to dispose of the custody and education of his child during its minority, even in his lifetime; but I think I am precluded from adopting this view, persuasive as Mr. Scott's contentions are, by the fact that in

Re Hutchinson (1912-13), 26 O.L.R. 601, 28 O.L.R. 114, Mr. Justice Hodgins and Mr. Justice Riddell have preferred another view, and I do not think it is open to me to disregard their opinion. They have traced the section in question to its origin, and it appears to them to be a mere recasting in modern language, and with some modification, of the statute of Charles, which related solely to the appointment of testamentary guardians; and the view they have taken is that the changes embodied in the section are not sufficient to confer upon the father the right to make a binding adoption agreement concerning his children.

But, although at law any deed made by the father was void, in equity a principle was established that the father might by his conduct preclude himself from asserting his natural and common law right. Instances are not wanting, even at an early period, where in Chancery the father was enjoined from asserting it, where it was detrimental to his children.

In *In re Agar-Ellis* (1883), 24 Ch.D. 317, at p. 333, Lord Justice Cotton says: "The father, although not unfitted to discharge the duties of a father, may have acted in such a way as to preclude himself in a particular instance from insisting on rights he would otherwise have; as where a father has allowed, in consequence of money being left to a child, the child to live with a relative and be brought up in a way not suited to its former station in life or to the means of the father. There the Court says, 'You have allowed that to be done, and to alter that would be such an injury to the child that you have precluded yourself from exercising your power as a father in that particular respect;' and then the Court interferes to prevent the father from having the custody of the child, not because he is immoral or has forfeited all his rights, but because in that particular instance he has so acted as to preclude himself from insisting on what otherwise would be his right."

This is in entire accord with other statements, *e.g.*, that of Lord Justice James in *In re Agar-Ellis* (1878), 10 Ch.D. 49, 72: "He may have abdicated such right by a course of conduct which would make a resumption of his authority capricious and cruel towards the children." This principle was also affirmed in *In re Scanlan* (1888), 40 Ch.D. 200. It is not necessary, where the father has voluntarily parted with his children, to shew such

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misconduct on his part as is necessary when the application is to take the child from the parents' custody: *Regina v. Gyngall*, [1893] 2 Q.B. 232.

In the case in hand, the mother having abandoned her children, and the father having executed the adoption agreements in good faith, and the foster-parents having had the care of the children for a considerable period of time and having fully lived up to their part of the bargain, and not only incurred expense but having nurtured the children at a time when such care was most needed, at the request of the father, I think he is precluded from now capriciously and against the interest of the children revoking the adoption agreements he executed, and that he ought not to be permitted to resume the custody of the children merely for the purpose of handing them over to the mother. It is manifestly in the best interest of the infants that they should be left in the good homes where they now are, rather than that they should be handed over to the mother, whose prospects for the future are most uncertain and precarious.

So far as the mother is concerned, if she has any right independently of her husband, her abandonment of the children precludes her from now asserting that right.

If I had come to the opposite conclusion, and felt compelled to award the custody of the children to the parents, I should have made that order subject to the payment of a substantial sum for the expenses the foster-parents have been at.

As it is, the motion fails, and should be dismissed with costs.

[IN CHAMBERS.]

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April 4.

ALDERSON v. WATSON.

Landlord and Tenant—Lease—Acceleration Clause—Chattel Mortgage—Assignment for Benefit of Creditors—Landlord and Tenant Act, R.S.O. 1914, ch. 155, sec. 38 (1)—Sale of Goods Distrained—Application of Proceeds—Right of Landlord as against Chattel Mortgagee.

The money realised from the sale of the goods distrained by the defendant, the landlord (see *Alderson v. Watson* (1916), 35 O.L.R. 564), having been paid into Court, it was held, upon a motion by the defendant for payment out, that, although the defendant was entitled, as against the plaintiff, who was the assignee of the tenant for the benefit of his creditors, to one year's rent only, yet, as against the chattel mortgagee, the amount of whose mortgage exceeded the amount realised by sale of the goods, the defendant

had the right, upon the making of the assignment, to distrain for two years' rent, as provided in the lease; and an order for payment out was made accordingly.

The limitation imposed by sec. 38 (1) of the Landlord and Tenant Act, R.S.O. 1914, ch. 155, could be invoked by the assignee only for the purpose of protecting his own interest in the chattels distrained, and did not enure to the benefit of the chattel mortgagee.

Railton v. Wood (1890), 15 App. Cas. 363, and *Brocklehurst v. Lawe* (1857), 7 E. & B. 176, followed.

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MOTION by the defendant, the landlord, for an order for payment out of Court of the money paid in under the judgment of a Divisional Court of the Appellate Division. See *Alderson v. Watson* (1916), 35 O.L.R. 564.

March 31. The motion was heard by MIDDLETON, J., in Chambers.

G. T. Walsh, for the applicant.

Hughes Cleaver, for the plaintiff, the assignee for the benefit of creditors of the tenant.

J. S. Schelter, for the chattel mortgagee.

April 4. MIDDLETON, J.:—This case was before the Appellate Division, and its decision is reported in 35 O.L.R. 564. By the judgment, as formally issued, the decision of Mr. Justice Britton was affirmed, with the variation that the proceeds of the goods sold were directed to be paid into Court subject to further order. The money was paid in, and this motion is made for payment out, notice being given to the chattel mortgagee, who was not a party to the original litigation.

The lease gave the landlord the right, upon the making of an assignment, to distrain for two years' rent. The assignment was made, the distress followed, the assignee contested the validity of the distress; and it was held, as against the assignee, that the landlord can distrain only for one year's rent.

The property was subject to a chattel mortgage, which exceeded the amount realised from the sale. As against the chattel mortgagee, the landlord had a right to distrain for the whole amount claimed. It is conceded that the landlord is entitled to the first year's rent, and to the costs of the distress, and that a sum of \$25 should be paid to Mr. McClenahan, who acted under an agreement in realising upon the goods. The right of the landlord to the second year's rent is now disputed. This, if allowed, will practically exhaust the fund.

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In my view, the landlord is entitled out of the fund to the whole amount that he claims. The assignee was entitled to nothing, as the amount due upon the chattel mortgage exceeded the amount realised upon the goods. As against the chattel mortgagee, who alone was concerned, the landlord could assert his full claim. The limitation imposed by the statute, the Landlord and Tenant Act, R.S.O. 1914, ch. 155, sec. 38 (1), was a limitation which could only be invoked by the assignee for the purpose of protecting his own interest in the chattels distrained upon. The limitation does not in any way enure to the benefit of the chattel mortgagee, nor can the assignee, by invoking this provision, take from the chattel mortgagee that which would be his, were it not that, as against him, the right of the landlord is entitled to prevail. This, I think, has been determined conclusively by the cases relied upon by Mr. Walsh: *Railton v. Wood* (1890), 15 App. Cas. 363, and *Brocklehurst v. Lawe* (1857), 7 E. & B. 176.

The proper order will therefore be, to direct payment out of Court of the amount of the landlord's claim, including Mr. McClenahan's \$25 and the costs of this motion. Any balance then remaining may well be divided between the chattel mortgagee and assignee, and be applied upon account of their costs of the motion.

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[IN CHAMBERS.]

April 5.

RE ARNOLD V. COOK.

Division Courts—Action Dismissed in Absence of Plaintiff—Mistake of Clerk—Judgment—Nullity—Division Courts Act, R.S.O. 1914, ch. 63, secs. 79 (2), 123—Prohibition.

A Division Court plaint having been transferred from the Seventh Division Court to the Tenth, the Clerk of the latter Court, on the 14th May, 1915, sent a notice to the plaintiff (sec. 79 (2) of the Division Courts Act, R.S.O. 1914, ch. 63) that the Court-day was the 27th May. The case, however, was put on the list for the 20th May, without further notice to the plaintiff; on that day, the case was called, and, no one appearing, it was dismissed. After the lapse of several months, but as soon as the dismissal came to the plaintiff's knowledge, he applied to the Division Court Judge, who treated the dismissal as a nullity:—

Held, properly so; and a motion for prohibition was refused.

The case did not fall within sec. 123 of the Act, which limits the time for applying for a new trial.

Re Nilick v. Marks (1900), 31 O.R. 677, distinguished.

Keating v. Graham (1895), 26 O.R. 361, 377, and *Hammond v. Schofield*, [1891] 1 Q.B. 453, 455, followed.

MOTION by the defendants for prohibition to the Tenth Division Court of the County of York.

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March 28. The motion was heard by KELLY, J., in Chambers.
G. T. Walsh, for the defendants.
C. H. Porter, for the plaintiff.

April 5. KELLY, J.:—The Division Court Judge, on learning of the circumstances under which the judgment was granted, very properly, as I think, treated it as a nullity and in effect set it aside. The action had been transferred from the Seventh Division Court of the County of York to the Tenth Division Court; and on the 14th May, 1915, the Clerk of the Tenth Division Court sent a notice, intended to be in compliance with sec. 79 (2)* of the Division Courts Act, R.S.O. 1914, ch. 63, to the plaintiff, in which it was stated that the Court-day was the 27th May, 1915. That was sufficient notice, under that section, of the holding of the Court, had the action been put on the list for trial on that date, and not on the 20th, for which date it was actually put on the list, and on which it was called for hearing. That gave less than the six clear days' notice required by sec. 79 (2), after the Clerk had received the papers; and at the Court on the 20th, of the holding of which no notice was given to the plaintiff, the case was called, and, no one appearing, it was dismissed.

In Mr. Porter's affidavit now before me, and which is supported by the plaintiff's affidavit, he says that it was not until the 9th March of the present year that he or the plaintiff became aware of the real happening, and then he promptly took proceedings to obtain a proper trial, and to that end made appli-

*79.—(1) If it appears that an action should have been entered in some other court of the same or some other county, it shall not fail for want of jurisdiction, but, on such terms as the Judge shall order, all the papers and proceedings in the action may be transferred to any court having jurisdiction in the premises, and shall become proceedings thereof as if the action had been entered therein, and shall be continued as if it had originally been entered in the last mentioned court.

(2) The clerk of the court, to which the proceedings have been transferred, shall place the action on the list for trial at the next sittings of his court which commences six clear days or more after he receives the papers, and he shall forthwith after receiving the papers notify the parties or their agents by registered post of the date, hour and place of the sittings, and the clerk issuing the summons shall certify in detail to the court to which the action is transferred all the costs incurred up to the date of the transfer.

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cation to the Division Court Judge. On the return of the motion, the Judge, the one who had presided at the Court on the 20th May, 1915, treated the entry of judgment on that date as a nullity.

The applicants now appeal to sec. 123* of the Division Courts Act, and contend that, the time there given for making application for a new trial having expired, the Judge had no jurisdiction to deal with the matter under that section; and that, there being no inherent jurisdiction in him to set aside the judgment—citing *Re Nilick v. Marks* (1900), 31 O.R. 677—the matter is at an end.

The Judge, however, proceeded quite differently, and treated what was in form an entry of judgment as a nullity, and so declared in his reasons.

Not overlooking the strictness with which the Courts have applied sec. 123, and recognising the absence of inherent jurisdiction as referred to in the case above cited, I am of opinion that the present case does not fall within that decision, or within sec. 123 of the Act, but that it comes rather within the meaning of the language used by Mr. Justice Meredith (now Chief Justice of the Common Pleas) in *Keating v. Graham* (1895), 26 O.R. 361, at p. 377, where, referring to the judgment then under consideration, he said: "It ought never to have been signed, and, had the officer's attention been called to the facts, there can be no doubt it never would have been signed." Similar in effect is this language used by Wills, J., in *Hammond v. Schofield*, [1891] 1 Q.B. 453, at p. 455: "If the judgment be improperly obtained, so that it never ought to have been signed, there can be no doubt when set aside it ought to be treated as never having existed."

There cannot be the least doubt that in the present case, had the attention of the trial Judge been drawn to the form of the

*123.—(1) Upon application made within fourteen days after the trial, or where the decision is not given at the trial after the mailing of the notice of the decision to the party applying, and upon good grounds being shewn, the Judge may grant a new trial upon such terms as he thinks reasonable, and in the meantime may stay proceedings.

(2) If reasonable excuse for the delay is shewn to the satisfaction of the Judge, the application may be made at any time within fourteen days after the expiration of the first mentioned fourteen days.

(3) Instead of granting a new trial, the Judge may pronounce the judgment which in his opinion ought to have been pronounced at the trial, and may order judgment to be entered accordingly.

notice of hearing sent to the plaintiff—that the Court would be held on the 27th—and there being no notice of a hearing on the 20th, he would not on the 20th have given judgment by default.

The application fails; the circumstances warrant a refusal of costs to either party.

[The order of KELLY, J., was, on the 28th June, 1916, affirmed by a Divisional Court of the Appellate Division. The reasons for judgment of the appellate Court are noted 10 O.W.N. 388, and will be reported in due course.]

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April 5.

WILLOUGHBY v. CANADIAN ORDER OF FORESTERS.

Life Insurance—Endowment Certificate—Proof of Age of Insured—Statutory Admission—Insurance Act, R.S.O. 1914, ch. 183, sec. 166, sub-secs. 7, 9, 10, 11.

In an action upon an endowment certificate whereby the defendants, a friendly society, insured the life of the plaintiff's husband, the only defence was, that, by the terms of the application and certificate, the defendants were not obliged to pay unless and until the age of the insured was admitted or proved. In the application and certificate, the age was stated as 33, but the plaintiff was not able to prove the correctness of the statement:—

Held, having regard to the provisions of sub-secs. 7, 9, 10, and 11 of sec. 166 of the Insurance Act, R.S.O. 1914, ch. 183, that the defendants, by not complying with the provisions of sub-secs. 7 and 9—which, by sub-sec. 11, were applicable to this contract, made in 1888—must be deemed to have admitted the correctness of the statement: sub-sec. 10; and the plaintiff was entitled to recover.

ACTION by the widow of William R. Willoughby, who died in 1915, to recover \$1,000 and interest upon an endowment certificate issued by the defendants to the deceased, dated the 21st November, 1888.

The action was tried by BRITTON, J., without a jury, at Brockville.

J. A. Hutcheson, K.C., for the plaintiff.

W. A. Hollinrake, for the defendants.

April 5. BRITTON, J.:—The plaintiff is the widow of William R. Willoughby, who died in 1915, and she brings this action against the defendants to recover \$1,000 and interest upon an endowment certificate issued by the defendants to William R.

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Willoughby as No. 7890, dated the 21st November, 1888. William R. Willoughby became a member of the defendants' Order—Court No. 66, at Gananoque. He continued a member in good standing in the Order until his death.

In Willoughby's application he stated that his age was 33, on his then last birthday—and that is the age stated in the endowment certificate now sued upon. There is no reason to think that the age was not truly stated.

The defence at the trial, and the only defence, was that, by the terms of the application, and by the terms of the endowment certificate, the defendants are not obliged to pay unless and until the age of the plaintiff's husband is admitted or proved.

There is no suspicion of fraud in this case—no wilful misrepresentation—nothing to shew that the age was not truly stated—nothing against the standing of the insured in the Order. The plaintiff is 57 years of age—but she is not in a position to prove the age of her husband.

The defence seems to me a purely technical one, and one that ought not to prevail in this case, unless it is one which, under the contract and statute, would clearly bar the plaintiff's recovery.

The plaintiff relies upon the Insurance Act, R.S.O. 1914, ch. 183, sec. 166, sub-secs. 7,* 9, 10, and 11. Sub-section 11 makes the whole of the provisions of sec. 166 applicable not only to any future application for or contract of insurance, but also to any application theretofore taken, and to any contract of insurance theretofore made.

Sub-section 10 is as follows: "Upon failure of a corporation to comply with the provisions of sub-section 7, the corporation shall be deemed to have admitted the age mentioned in the application as the correct age."

But (by sub-sec. 9) sub-sec. 7 "shall not apply to a registered friendly society, provided that the notice mentioned therein is

* (7) Subject to the provisions of the previous sub-sections of this section, every corporation registered under this Act shall send to every person with whom a contract is made, within one month thereafter, a printed notice mailed to the last known address of the insured, in such form as the Superintendent shall approve, and annually thereafter until proof of age is admitted, stating that the age of the insured is material to the contract, and that evidence that the age stated in the application is the true age of the insured will be required before the policy is paid; and such notice shall also be printed in red ink in type not smaller than 10 point upon all notices to the insured and upon all receipts for premiums.

. . . printed in red ink in type not smaller than 10 point upon all certificates issued by the society, and upon all receipts or pass-books issued to the members."

The defendants did not comply with this requirement.

The defendants, from before 1914 until the death of Willoughby, received his monthly payments, and he handed in his pass-book and obtained from the defendants a receipt for each sum so paid and entered in the pass-book, and there was not, upon the return of the said pass-book, printed on the book or upon or attached to or accompanying the receipt, any such notice as the statute requires. The pass-book used in Willoughby's case is exhibit 4. It would appear that the defendants did not overlook, or by mere inadvertence omit to print upon the pass-book or receipts, the notice. They apparently concluded that it was not necessary in the case of past contracts, ignoring sub-sec. 11. The defendants did provide new pass-books upon which a notice, no doubt intended as a compliance with the Act, is printed—see exhibit 9—but Willoughby was not provided with one of the new issue, and no receipts with the notice were furnished to him.

My judgment is, that the defendants must be deemed to have admitted the age mentioned in the application as the correct age—pursuant to sub-sec. 10. The defendants had this application in their possession.

There will be judgment for the plaintiff for \$1,000, with interest at 5 per cent. per annum from the date of the issue of the writ, namely, the 19th day of November, 1915. The writ should be filed and attached to what is called the record in this case. The judgment will be with costs, payable by the defendants to the plaintiff.

[The judgment of BRITTON, J., was, on the 29th May, 1916, affirmed by a Divisional Court of the Appellate Division. The reasons for the judgment of the appellate Court are noted 10 O.W.N. 291, and will be reported in due course.]

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REX v. SINCLAIR.

Criminal Law—Theft—Conviction—Police Magistrate for City—Jurisdiction—Place of Offence—Place of Residence of Accused—Criminal Code, sec. 577—Railway Conductor—Appropriation of Money Received from Passenger—Evidence—Penalty—Fine—Authority to Impose—Criminal Code, secs. 773 (a), (b), 777 (5), 780, 1035, 1044.

The defendant, residing in the city of Toronto, was charged before the Police Magistrate for the city and convicted, upon summary trial, for theft. The defendant was conductor of a railway train running from Stratford to Toronto, and the offence consisted in accepting a sum of money from a passenger for fares and retaining the greater part of the sum received, while paying over a small portion to the company:—

Held, that, although it did not appear that the offence was committed within the city of Toronto, the Police Magistrate had jurisdiction under sec. 577 of the Criminal Code.

(2) That there was evidence before the magistrate upon which the conviction for theft could be properly made.

Rex v. McLellan (1905), 10 Can. Crim. Cas. 1, followed.

Rex v. Thompson (1911), 21 Can. Crim. Cas. 80, not followed.

(3) That the penalty imposed, viz., a fine of \$100, was within the authority of the magistrate.

Sections 773 (a), (b), 777 (5), 780, 1035, and 1044 of the Criminal Code considered.

APPLICATION on behalf of the defendant to quash a conviction for theft made against him by a Police Magistrate.

April 7. The motion was heard by CLUTE, J., in Chambers.

D. Campbell, for the defendant.

J. R. Cartwright, K.C., for the Crown.

April 8. CLUTE, J.:—This is an application to quash a conviction made by George T. Denison, Esquire, Police Magistrate for the City of Toronto.

The accused is charged with having, on the 17th February, 1916, at the city of Toronto, stolen \$5 of the moneys of the Grand Trunk Railway Company, within the Province of Ontario. The accused resides in the city of Toronto.

The first objection is, that the magistrate had no jurisdiction, inasmuch as it does not appear that the offence was committed within the city of Toronto.

There is no doubt that the general policy of the common law was that a person accused of an offence should be tried in the county where the offence was committed. Section 577 of the

Criminal Code, however, provides that, unless otherwise specially provided in this Act, every court of criminal jurisdiction in any Province is competent to try any crime or offence within the jurisdiction of such court to try, wherever committed within the Province, if the accused is found or apprehended or is in custody within the jurisdiction of such court, etc. No doubt, the accused has the right to apply to change the venue. So far as the record here shews, the trial was proceeded with without objection; and, in my opinion, the Police Magistrate had jurisdiction, under sec. 577 of the Code, to try the case.

The second objection taken is, that what took place did not amount to theft. The facts are, as shewn in the evidence, that the accused was conductor of a train running from Stratford to Toronto, upon which three men, Saunders, Webster, and Bedbrook, were passengers. When the conductor came to Saunders for fare, Saunders handed him a \$5 bill, upon which the conductor gave hat-checks to Webster and Bedbrook, and the three came to Toronto on that payment. This amount was not returned to the auditor of the Grand Trunk Railway Company; but, instead thereof, the return shewed that the only money received for cash fare was 15 cents on this trip, and the hat-checks were handed in to represent this amount. The conductor thus recognised this money as belonging to the company, and paid over a part of it with his returns. This is striking evidence that he received the \$5 as a fare, while appropriating all but the 15 cents.

The defence relied mainly on the case of *Rex v. Thompson* (1911), 21 Can. Crim. Cas. 80, where the majority of the Court held that a payment made by a passenger to a railway conductor, for his own use, of a much lower sum than the regular fare, by way of bribe for not collecting the fare which it was the conductor's duty to collect for the railway company, was not money received "on terms requiring him to account" for or pay the same to the company, and would not support a charge of theft in respect of his wilful failure to turn in the amount with his returns of money and tickets to the company. Simmons, J., dissented, following the case of *Rex v. McLellan* (1905), 10 Can. Crim. Cas. 1, where it was held that under similar circumstances the offence was properly laid as constituting the crime of

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theft, and the conviction upheld (Harvey, J., dissenting). I prefer the decision in *Rex v. McLellan* to that in *Rex v. Thompson*, and I think the present case stronger against the prisoner in this, that he himself recognised the money as belonging to the company by paying in a part of it. I hold that there was evidence upon which the conviction could be properly made.

The third objection is, that there is no authority for imposing the penalty which was imposed, namely, a fine of \$100. Section 773, clauses (a) and (b), of the Criminal Code, refers to theft where the amount does not exceed the sum of \$10, and provides that the magistrate may hear and determine the charge in a summary way. The punishment prescribed by sec. 780 of the Code in respect of convictions under clauses (a) and (b) is imprisonment for any term not exceeding six months. By sec. 777, as amended and added to by 8 & 9 Edw. VII. ch. 9, it is declared (sub-sec. 5) that the jurisdiction of a magistrate in a city having a population of not less than 25,000 is absolute, and does not depend upon the consent of the accused, in the case of a person charged with theft. Section 1035 of the Code provides that any person convicted by any magistrate, under Part XVI., of an indictable offence punishable with imprisonment for five years or less, may be fined in addition to or in lieu of any punishment otherwise authorised; and sec. 1044 provides that a magistrate, under Part XVI., by whom judgment is pronounced upon the conviction of any person for an indictable offence, in addition to such sentence as may be authorised by law, may condemn the person to payment of the whole or any part of the costs.

The motion to quash will be dismissed with costs.

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 April 13.

[MIDDLETON, J.]

KENNEDY v. SUYDAM.

Will—Executor—Power of Sale—Residuary Clause—Maintenance of “Residence”—Rule against Perpetuities—Legacy Charged on Estate—Trustee Act, R.S.O. 1897, ch. 129, secs. 16, 19—1 Geo. V. ch. 26, sec. 46—Devolution of Estates Act—Contract of Sale—Res Judicata—Land Titles Act.

The testator by his will gave his dwelling-house to his son J., whom he appointed executor with two others, who renounced; probate was granted to J. alone. After making certain provisions for different members of his family, the testator directed that out of his estate there should be paid to his son D. \$400 a year during his life, adding: “I hereby charge my estate

with this annuity in favour of my son D." This provision was followed by provisions for other members of the testator's family; and then followed a clause by which the testator gave all the residue of his estate, real and personal, to his executors and trustees "to be used and employed by them in their discretion . . . in so far as it may go to the maintenance and keeping up my house and premises herein bequeathed to my son J. with full power and authority to them to make sales of any real estate . . . and to execute all deeds . . . and to make title thereto to any purchaser thereof and the proceeds of such sale to devote as in their discretion . . . may seem meet and necessary to keep up and maintain my said residence in the manner in which it has been heretofore kept and maintained and if for any reason it should be necessary that the said residence should be sold and disposed of I direct upon such sale being completed that the residuary estate then remaining shall be divided in equal proportions among the several pecuniary legatees under this my will." The testator died in 1906. In 1910, J. entered into an agreement with a realty company to sell and convey certain land, forming the bulk of the residuary estate, to that company for \$97,000. This sale was afterwards carried out. In January, 1911, J. executed a deed poll by which he appropriated the entire proceeds of the residuary estate for the maintenance and upkeep of the "residence." In this action, R., one of the sons of the testator, sought to set aside the sale to the company, contending that there was no power of sale which J. could rightly exercise:—

Held, that the testator, having charged the \$400 legacy upon his estate, and having devised his estate to his executor, gave to the executor a power of sale, quite apart from the residuary clause, and this power might be exercised without the purchaser being put on inquiry to ascertain if it was being duly exercised: Trustee Act, R.S.O. 1897, ch. 129, secs. 16, 19.

- (2) That, while the executor might have, by virtue of the Devolution of Estates Act, an additional power to sell, that power in no way derogated from the powers expressly given by the will itself or by any statutory implication from the words used in the will: 2 Edw. VII, ch. 17, sec. 1. The provision of the new Trustee Act, 1 Geo. V, ch. 26, sec. 46, making the provision found in sec. 16 of the earlier Act "subject to the provisions of the Devolution of Estates Act," does not change the result; for the Devolution of Estates Act expressly preserves the express and implied power of sale found in the will; and the right of the purchaser is based upon the contract, which was made before the passing of the new Trustee Act.
- (3) That the power expressly conferred by the will did not fall merely by the direction given to the executors to use the fund for a purpose which offended against the rule as to perpetuities—the executor held the fund to be distributed among those who would take upon an intestacy.
- (4) That the claim of the plaintiff was *res judicata* in former litigation between the parties, in which the sale to the company was upheld, and the power to sell was necessarily in issue.
- (5) That, as to the land brought under the Land Titles Act, the registration had been sufficient to confer an absolute title upon the purchaser.
- (6) That the action should be dismissed with costs.

ACTION by Robert Kennedy to set aside a sale of land made by James H. Kennedy, executor of the will of David Kennedy, to the defendants Henry Suydam and the Suydam Realty Company Limited, who in turn sold to the defendants the Toronto Development Company.

April 5, 6, and 7. The action was tried by MIDDLETON, J., without a jury, at Toronto.

W. N. Tilley, K.C., and J. H. Fraser, for the plaintiff.

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I. F. Hellmuth, K.C., for the defendants Henry Suydam and the Suydam Realty Company Limited.
E. D. Armour, K.C., and *W. H. Clipsham*, for the defendants the Toronto Development Company.

April 13. MIDDLETON, J.:—This action is the last of a long series in connection with the estate of the late David Kennedy. The question raised is of importance, and it is singular that in none of the numerous judgments that have been pronounced is there any clear expression of opinion concerning the precise matter which is now raised.*

David Kennedy died on the 17th February, 1906. By his will, dated the 4th July, 1903, he appointed his son James H. Kennedy, his granddaughter Gertrude Foxwell, and Annie Hamilton, executors. The two last named having renounced, probate was granted to James H. Kennedy alone.

By the will the testator gave to James H. Kennedy his dwelling-house; and, after making certain provisions for different members of his family, which are not now material, he directed that out of his estate there should be paid to his son David the sum of \$400 per annum during the term of his natural life, adding: "I hereby charge my estate with this annuity in favour of my said son David." This provision is followed by a number of further provisions for other members of the family, which are also now immaterial. Then follows the residuary clause, which has given rise to much controversy:—

"The rest residue and remainder of my estate both real and personal I give devise and bequeath to my executor executrices and trustees aforesaid to be used and employed by them in their discretion or in the discretion of a majority of them in so far as it may go to the maintenance and keeping up my house and premises herein bequeathed to my son James Harold Kennedy with full power and authority to them to make sales of any real estate upon such terms and conditions and otherwise as may be expedient and to execute all deeds documents and other papers necessary for the sale of same and to make title thereto to any purchaser thereof and the proceeds of such sale to devote as in

* See *Kennedy v. Kennedy* (1912-13), 26 O.L.R. 105; *Kennedy v. Kennedy* (1911), 24 O.L.R. 183; *Foxwell v. Kennedy* (1911), 24 O.L.R. 189.

their discretion or in the discretion of a majority of them may seem meet and necessary to keep up and maintain my said residence in the manner in which it has been heretofore kept and maintained and if for any reason it should be necessary that the said residence should be sold and disposed of I direct upon such sale being completed that the residuary estate then remaining shall be divided in equal proportions among the several pecuniary legatees under this my will."

After the death of the testator, there was litigation as to the validity of this will and as to the validity of certain deeds, covering a large portion of the testator's property, made by his son James in assumed pursuance of powers conferred upon him by a power of attorney executed by his father. These contentions were disposed of by Mr. Justice Anglin, who set aside the conveyances, upheld the will, and directed that the lands conveyed should be reconveyed to the executor.

Robert Kennedy, the present plaintiff and one of the testator's sons, having failed to obey the direction to reconvey the land which had been conveyed to him, a vesting order was made, vesting the lands in the executor.

Assuming that he had power to do so, James H. Kennedy executed a deed poll bearing date the 20th January, 1911, by which he appropriated the entire proceeds of the residuary estate for the maintenance and upkeep of the residence which had been devised to him.

In the meantime, on the 26th September, 1910, James H. Kennedy had entered into an agreement with the Suydam Realty Company Limited to convey certain property, forming the bulk of the residuary estate, to that company for the price of \$97,000.

An action was brought by Gertrude Maud Foxwell, attacking the right of the executor to sell and the validity of the residuary clause. A preliminary objection to the status of the plaintiff was taken, and argued as a point of law. The decision upon this was adverse to her, and her action was dismissed.

In that action, however, James H. Kennedy counterclaimed, asking for specific performance of the agreement entered into by the Suydam company, and claiming damages against the plaintiff by reason of the carrying out of the sale being obstructed by the registry of a caution in the Land Titles office. To this

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counterclaim Robert Kennedy entered a defence in which he denied the right of the executor to be recorded in the Land Titles office as the absolute owner of the land and his right under the will to sell, and further alleged that the sale was an improvident one, made at a gross undervalue.

This counterclaim came on for trial before the present Chief Justice of Ontario, then Chief Justice of the Common Pleas, and a good deal of discussion took place as to the issues that were really open for determination in that action. It was then pointed out that, after the failure of the plaintiff to obtain the redress she sought in the main action, another action had been brought by David Kennedy for the purpose of obtaining construction of the will, and that this action had not yet been heard. Evidence was given at some length upon the value of the land, with a view to shewing the improvidence of the sale, and judgment was reserved, without the question of construction of the will having been argued; his Lordship stating that he would let this matter stand to allow the parties to take such course as they might be advised.

On the 30th January, 1912, judgment was given; it is said upon the application of James H. Kennedy and the Suydam Realty Company, and upon the statement of the purchaser that he did not desire a reference as to title. This judgment declares that the sale was not improvident, directs specific performance, and further directs that the balance of the down payment of purchase-money be made to the purchaser, the conveyance and mortgage to secure the balance to be executed, such conveyance and mortgage to be settled by the Master if the parties differ.

It is to be noted that this judgment, which was not accompanied by any reasons, does not expressly deal with the question raised by Robert Kennedy and his co-defendants as to the power of the plaintiff to sell under the will, and does not in any way reserve the rights of the contesting defendants.

On the 3rd March, 1911, David Kennedy brought his action asking for the construction of the will, and in it he set out his contention that the devise in the residuary clause of the will above quoted was void, and that the residue should be divided as upon an intestacy; and finally, in clause 13 of the statement of

claim, submitted a series of questions upon which the opinion of the Court was asked, *inter alia*: "(a) Is the devise of the said residue for the purpose of maintaining and keeping up the house and premises bequeathed to the defendant James H. Kennedy void for remoteness? (b) If it is void, has the said James H. Kennedy power to sell the said lands, as to which there would therefore be an intestacy?"

Robert Kennedy, by his defence filed in that action, made common cause with the plaintiff. The action came on before Mr. Justice Teetzel on the 5th March, 1912, and he delivered judgment on the 28th March, holding that the provisions found in the residuary clause for the upkeep of the house were void as tending to create a perpetuity and that there was an intestacy as to the whole residue; but nothing was said either in the reasons for judgment or in the formal judgment expressly dealing with the question which had been clearly enough raised concerning the right of James H. Kennedy to dispose of the lands under the power of sale also found in the residuary clause, or otherwise.

An appeal was had by Robert Kennedy from the judgment of the Chief Justice of the Common Pleas. This came before a Divisional Court on the 6th May, 1912 (see *Foxwell v. Kennedy*, 3 O.W.N. 1225), but the appellant seems to have failed to present his case in any very intelligible manner, and the Court affirmed the judgment without in any way dealing with the real question involved, namely, the existence of any right on the part of James H. Kennedy to sell the lands at all.

James H. Kennedy, dissatisfied with the judgment of Mr. Justice Teetzel (*Kennedy v. Kennedy* (1912), 26 O.L.R. 105), appealed from it to the Court of Appeal. In that action the Suydam Realty Company had been made parties defendant, and the plaintiff had contended that the sale ought not to be carried out, even if Kennedy had authority to sell, as the sale was improvident and at a gross undervalue. As to this defendant, the action had been dismissed with costs. The appellant, being contented with the sale to the Suydam company, did not make that company respondent upon the appeal, his contention being that the residuary clause was valid.

Robert Kennedy and his brothers, by their reasons against appeal, sought not only to uphold the judgment of Mr. Justice

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Teetzel, declaring the invalidity of the residuary gift, but sought to cross-appeal in so far as the action was dismissed as against the company; asserting, in clauses 7 to 9 of their reasons, the alleged error in the judgment under review; clause 9 reading: "The disposition of the residue being void, the power of sale for the purposes thereof was and is also void and should be so declared."

The cross-appeal came to nothing, because no notice of it was given to the Suydam company; the certificate of the Court of Appeal reciting that no effective appeal had been launched as to it.

The reasons for judgment of the Court of Appeal (*Kennedy v. Kennedy* (1913), 28 O.L.R. 1), deal with the gift only, and do not discuss the question of the validity of the power of sale. The judgment of Mr. Justice Teetzel was varied by directing James H. Kennedy to pay into Court the proceeds of the sale to the Suydam company and by directing an administration of the estate of the testator, and referring the action to the Master for that purpose.

Upon this reference the Master proceeded to deal with the matters referred to him, and by an interim report found that certain moneys in Court, including the proceeds so far realised of the Suydam sale, could safely be divided among the heirs, there being \$27,000 thus available; and, upon this report being confirmed, it was ordered that the share of each of the nine persons entitled should be paid out to him. Robert Kennedy was represented before the Master and upon the motion for distribution. It is said that before the Master he protested, but his objection was overruled, and he did not appeal from the report. He has not taken his \$3,000 out of Court, but he was party to his wife receiving a certain sum out of one of the other shares, and also to an adjustment of the costs of litigation by which a certain sum was paid out of the share of one of the other brothers.

The decision of the Court of Appeal was taken to the Privy Council, and there the decision was affirmed without qualification: *Kennedy v. Kennedy*, [1914] A.C. 215. Their Lordships dealt with the only question which was argued before them, namely, the validity of the residuary gift, and did not in any way discuss the question of the power of sale.

The Suydam company were not parties to the appeal.

In the action tried before Teetzel, J., and ultimately taken to the Privy Council, *res judicata* by reason of the decision in the earlier litigation was set up; but, as pointed out in the decision of the Court of Appeal, the matter then in litigation had not been passed upon in any of the earlier decisions, and the statement of their Lordships in the Privy Council must be read in the light of the facts pointed out in the Court of Appeal, and cannot, I think, be regarded as in any way interfering with the well-established principles underlying this plea.

In the action before me, the plaintiff's fundamental contention is, that there is no power of sale which James H. Kennedy could rightly exercise, and that therefore the sale falls to the ground. To this contention the defendants make several answers, which I think are well-founded.

First, it is claimed that there is a valid power of sale; secondly, that, by reason of the litigation which I have outlined, the matter is *res judicata*; thirdly, that, by reason of the proceeds of the sale having been dealt with in the way that I have stated, Robert Kennedy cannot now claim to be entitled to the land; fourthly, that, by reason of the registration of the conveyances under the Land Titles Act, the title of the Suydam company and the title of the Toronto Development Company, to which it has now sold the land, is absolute; and, lastly, that a large portion of the land having been sold and conveyed to purchasers who have registered their conveyances under the Land Titles Act, and who are not parties to this litigation, their title should not be interfered with. A small portion of the land is not in the Land Titles office, has been sold, and the right of these purchasers also ought not to be interfered with.

Dealing with these matters in order, I think that there is, quite apart from the residuary clause, a statutory power of sale vested in the executor. By the Trustee Act, R.S.O. 1897, ch. 129, sec. 16, which was the statute in force at the time, if a testator charges his real estate with the payment of any legacy, and devises the estate so charged to any trustee, without making express provision for the raising of the legacy, notwithstanding any trust actually declared, the trustee may raise the legacy by sale of the land, and (sec. 19) purchasers are not bound to inquire whether the power conferred has been duly exercised.

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Applying that to this case, the testator, having charged the \$400 per annum legacy upon his estate, and having devised his estate to his executor by the clause in question, gave to the executor an implied power of sale, and this power might be exercised without the purchaser being put on inquiry to ascertain if it was being duly exercised.

Mr. Tilley argued that this power had been cut down by the provisions of the Devolution of Estates Act. With this I cannot agree. That Act, I think, confers upon the executors an additional power to sell, where the sale is authorised by it, during the limited period of three years, which may be prolonged by the registration of a caution; but this power in no way derogates from the powers which are expressly given either by the will itself or by any statutory implication from the words used in the will: 2 Edw. VII. ch. 17, sec. 1 (amending the Devolution of Estates Act, R.S.O. 1897, ch. 127; see now sec. 14 of the Devolution of Estates Act, R.S.O. 1914, ch. 119).

Further, I think the power expressly conferred by the will did not fall merely by the direction given to the executors to use the fund for a purpose which offends against the rule as to perpetuities. The executor held the fund to be distributed among those who would take upon an intestacy. Frequently this is spoken of as an intestacy as to the property, but this is not, I think, strictly accurate.

Then it seems to me that the plea of *res judicata* has been satisfactorily made out; not so much because of any clearly expressed adjudication upon the precise point, as because the adjudication which has taken place is necessarily predicated upon a determination adverse to the plaintiff of the very point in issue. Both before the Chief Justice and Mr. Justice Teetzel, the sale to the Suydam company was upheld. It was directed to be carried out. The proceeds were directed to be paid into Court and to be divided among those entitled. This could not have been found and directed save upon the antecedent finding that the executor had the power to sell. The power to sell was necessarily in issue in both cases.

This was known to Robert Kennedy, for in the pleadings and in the reasons for appeal that I have quoted it is plainly brought in issue. That, through some mischance, the question was not

investigated and discussed in a way that would be satisfactory to Robert Kennedy, does not prevent the actual adjudication having its conclusive effect.

A judgment determines every right, question, or fact distinctly put in issue as a ground of recovery or defence. It also determines all matters which ought to have been brought forward as part of the controversy. In both these issues a substantive part of the controversy was the validity of the sale now in question.

Two grounds were put forward as shewing its invalidity, and the judgment is conclusive as to both. The judgment would have been equally conclusive if in the litigation one ground alone had been maintained: *Henderson v. Henderson* (1843), 3 Hare 100; *Bake v. French*, [1907] 1 Ch. 428; *Humphries v. Humphries*, [1910] 1 K.B. 796, [1910] 2 K.B. 531; *Re Ontario Sugar Co., McKinnon's Case* (1910), 22 O.L.R. 621; and *Southern Pacific R.R. Co. v. United States* (1897), 168 U.S. 1.

I am also of opinion, as far as the land registered under the Land Titles Act (R.S.O. 1914, ch. 126) is concerned, that the registration has been sufficient to confer an absolute title upon the purchaser. I do not feel called upon to go through the different sections of the Act at length on this occasion.

Since the above was dictated, my attention has been drawn to the fact that, while the sale was agreed upon before the Trustee Act (R.S.O. 1897, ch. 129) was amended in 1911 (by the Trustee Act, 1 Geo. V. ch. 26), it was not carried out until after the new Act came into force, and that this Act (sec. 46) makes the provision found in sec. 16 of the earlier Act "subject to the provisions of the Devolution of Estates Act."

I do not think this in any way changes the result; for, as I have pointed out, the Devolution of Estates Act expressly preserves the express and implied power of sale found in the will; and, further, the right of the purchaser is based upon the contract, which was made before the amendment. See sec. 14 of the Interpretation Act.

The action fails, and must be dismissed with costs.

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The defendant was *held* bound by two contracts for the purchase of goods from the plaintiffs, made by one D. in the name of the defendant, the authority of D. being denied by the defendant, who refused to accept the goods.

Per MEREDITH, C.J.C.P., and LENNOX, J.:—Upon the evidence, the purchases were purchases within the authority of D., acting for and in the name of the defendant; and, if that were not so, the defendant was estopped from denying that the contracts were his contracts.

Per MASTEN, J.:—D. was originally a special agent of the defendant, but he became, before the contracts were made, the defendant's general agent in the buying and selling of the class of goods covered by the contracts; those contracts were within the ordinary scope of the business intrusted to D., and the plaintiffs were entitled to assume that he had full authority to enter into them.

Held, also, that the contracts were not rendered unenforceable for fraud by reason of the fact that the plaintiffs' broker divided with D. commissions upon the sales which he received from the plaintiffs. The defendant had notice of the division; and the facts did not bring the case within the rule that where a person in the employment of another is bribed with a view to inducing him to act otherwise than faithfully to his employer, the agreement is a corrupt one and unenforceable at law, whatever the effect produced on the mind of the person bribed may be.

Harrington v. Victoria Graving Dock Co. (1878), 3 Q.B.D. 549, *Great Western Insurance Co. v. Cunliffe* (1874), L.R. 9 Ch. 525, and *Baring v. Stanton* (1876), 3 Ch.D. 502, specially referred to.

Panama and South Pacific Telegraph Co. v. India Rubber Gutta Percha and Telegraph Works Co. (1875), L.R. 10 Ch. 515, and *Hitchcock v. Sykes* (1913-14), 29 O.L.R. 6, 49 S.C.R. 403, distinguished.

Judgment of MIDDLETON, J., reversed.

THE plaintiff company, as vendors, brought this action to recover the difference between the contract price of goods sold to the defendant and the price realised from a resale, the defendant having refused to accept delivery.

April 23, 1915. The action was tried by MIDDLETON, J., without a jury, at Chatham.

J. G. Kerr, for the plaintiff company.

R. McKay, K.C., for the defendant.

May 4, 1915. MIDDLETON, J.:—This is one of those unfortunate cases in which a serious loss must be borne by one of two innocent parties, owing to the misconduct of a third person, who is financially worthless.

Mr. Desmarais, who is really the plaintiff, acted, I think, in perfect good faith throughout—supposing that he had in truth made the contract sued upon with Mr. Barry, who was carrying on business under the name of John Barry & Son. On the other hand, Mr. Barry acted, I think, throughout, with perfect honesty, and I accept his evidence without question.

The real issues in the action relate to two supposed contracts for the purchase of canned tomatoes. There is a minor issue arising out of an earlier contract, concerning which there is no dispute, and this may as well be first cleared up. Upon this contract tomatoes were sold, but the purchaser was unable to accept delivery. He requested the vendor to arrange for storage. There was no place readily available, and the vendors finally arranged to have the tomatoes cared for in the basement of the Roman Catholic Church at Stoney Point. Naturally this has occasioned a good deal of expense, greater than the ordinary charge for warehousing canned goods. The ordinary charge would amount in round figures to \$100. The claim made amounts to \$400. I cannot say that this is unreasonable, and the plaintiffs should, in any event, have judgment for this amount.

The first transaction concerning which there is dispute relates to the purchase on the 12th October, 1914, of eleven thousand cases of canned tomatoes, three dozen to the case, at the price of \$16,879.50. The second transaction relates to the purchase of twelve thousand cases of tomatoes by the acceptance of an option dated the 1st October, 1914, at the price of \$18,000, the acceptance said to have been by letter of the 7th November, 1914. The controversy in both cases is as to the authority of one Durocher, who purported to make the contract in the name of the defendant. It may be taken for granted, I think, that Durocher had not in fact any authority to make the contracts; and the question really is, whether the defendant is precluded from denying Durocher's authority because of having held him out as his agent under such circumstances that authority would be presumed.

The whole story is extraordinary. Durocher is a comparatively young man, who had failed in his own business. Barry had succeeded to the business carried on for many years by his father, and is a successful business man of considerable means.

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As a mere act of friendship towards Durocher, Barry had given him office room in his office. He allowed him to bring his desk there and make it his business headquarters. While there, Barry had permitted Durocher to avail himself of the services of Barry's stenographer, and Durocher had, for his own purposes, used Barry's stationery.

Last summer there was a good deal of talk of crop failure. When war was declared, there was much conjecture as to the demands that would be made upon the goods available on the market. Durocher and Barry naturally were much thrown together, although Barry was a great deal away from the office. Durocher talked to Barry of the possibility of making money by purchasing canned goods, and finally Barry sanctioned the purchasing of \$15,000 or \$20,000 worth. In the meantime, Durocher had been making inquiries from different persons as to the market price of these commodities. Barry learned that Durocher, in making these inquiries, had used his (Barry's) trade name, but he did not regard this as a matter of any particular significance, thinking it was in line with Durocher's suggestion that profitable contracts could be made, and in none of the letters was there anything more than mere inquiry as to price and terms. When Barry gave Durocher the authority to buy the quantities specified, he knew that Durocher went on the market to buy; and, when drafts for the price came in, he accepted them, upon Durocher's assurance that they were all right. The purchases so made exceeded the amount authorised, but the excess was trivial, and none of these purchases are in controversy here.

It should be also mentioned that Barry had aided Durocher financially to a very considerable extent. Durocher's remaining business consisted almost entirely of some vinegar works in Montreal. Barry financed him in connection with this; and, at the time of the transactions now involved, Durocher was hopelessly indebted to Barry. The question of remuneration of Durocher for the services rendered in the purchasing of these goods does not appear to have been discussed. It was understood that some remuneration would be allowed, but Durocher's debt was so great that this remuneration would at most be a small credit upon the large total.

The Stoney Point Canning Company had placed their output in the hands of W. B. Millman & Sons, who acted as bro-

kers for the Independent Cannery. Durocher, without Barry's authority, on the 5th August, 1914, made a contract to purchase in Barry's name fifty thousand cases of tomatoes. This was supposed to be made up by allocation of portions among the different cannerys represented by Mr. Millman. Millman, on the 5th October, 1914, made an allocation, and asked the assent of Durocher to this. The Stoney Point Canning Company were given as their share eleven thousand cases. Durocher assented in the name "John Barry & Sons, per A. Durocher;" and, on the 12th October, the usual bought and sold notes were sent by the broker.

On the 23rd November, a draft was made for the purchase-price, accompanied by an invoice. This draft was not presented to Barry until the 28th, when it was not accepted; Mr. Barry telling the banker that no such draft was authorised.

The second contract in controversy arose in this way. Durocher, at the time of making the contract already referred to, had conceived this scheme of cornering all the goods which were not controlled by the Dominion Cannery Association, and then forcing the situation with the Dominion Cannerys in such a way as to inure to his own benefit. Following out this scheme, he procured options from the different cannerys for the whole of their prospective output for the year 1914; the earlier contract relating to the 1913 pack. These options he took in the name of John Barry & Sons, the option to remain open until the 1st November, 1914. The option was not exercised within the time; but, on the 7th November, Durocher purported to exercise the option, signing the documents in the name of John Barry & Sons "per A. Durocher." The time for acceptance had been in some way informally extended, and the plaintiffs recognised the right to accept by their letter of the 19th November, when they said they were drawing for the price under both contracts.

Turning now to the real relations between Durocher and Barry: there never was any relationship of master and servant. Durocher never had any general authority from Barry. He had been authorised to purchase certain goods for Barry, and the transaction had grown to much larger bulk than originally contemplated. Two letters, of the 7th November and the 8th November, respectively, are of importance. At this time Barry was

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finding himself most seriously embarrassed by the large quantity of goods which he was carrying. He had been led into this by Durocher. He was looking to Durocher to help him out of the situation. The bank which held Barry's notes was pressing. The market was poor. On the 7th October, Durocher wrote from Toronto stating that, as the result of a meeting of Canned Foods Limited—i.e., of a combination opposed to the Dominion Cannery—he had secured an option till the next Monday on the balance of their pack, one hundred and twenty-five thousand cases. He suggested that he could not see any way out except to try and gobble up all the tomatoes left unsold in the hands of these packers, and also those outside, about seventy-five thousand cases additional, and then to approach the Dominion Cannery. Durocher said he would not commit himself to any further purchases, but was getting options on the best terms possible, and suggested to Barry to see the bank and ascertain what could be done, as they might have to “swing these goods” until spring.

To this Barry replied on the 8th, stating that he already owed the bank over \$140,000, covering payments falling due on Durocher's purchase, and he did not wish to incur any further liability or to borrow any more money; he had all he could carry, and he would not attempt to purchase the two hundred thousand cases, assuming a liability of approximately \$300,000, single-handed. He then urges an effort to sell, so that he may be in funds to meet his notes. He hoped for some report of progress in the negotiations with the Dominion Cannery.

Negotiations were continued by Durocher, and on the 15th he wired Barry asking him if he would give an option on his interest in the deal—that is, as I understand it, upon the tomatoes he had already purchased—for \$10,000 profit. Apparently this was assented to, as on the 19th Barry wrote Durocher stating that he hoped he would succeed in turning the deal over at 85 cents, “with the division we discussed.”

On the 20th, this was followed by another letter, stating: “We are heavily overdrawn in the bank, and if you do not make a deal with the parties you are negotiating with it will be necessary to sell, to realise enough to cover these drafts.”

On the 21st, Barry again writes, giving Durocher a list of payments falling due, \$174,775, and advising “the bank will

make no further advances, and there must be a sale to enable the drafts to be met"—again referring to the \$10,000 coming to him on the basis of a sale at 85 cents—and suggesting a mode of approach to those with whom Durocher was negotiating.

Again, on the 26th, Barry wrote urging realisation. About this time an interview took place with the representatives of the Dominion Cannery, at which Barry was present, but nothing was accomplished.

About the 4th November, Barry again wrote from New York: "If deal goes through, we must get some money quick; if deal does not carry, we must sell some goods quick by wire to realise."

The next document of importance is an undated letter, exhibit 14, probably written on the 19th November. A telegram had been sent on the same day, asking for funds to cover expenses. The letter first refers to this. Durocher appears to have been fairly well convinced that his negotiations with the Dominion Cannery would be abortive, unless through some masterpiece of strategy he could change the situation. He had prepared a telegram which he proposed sending to the trade, offering to undersell the Dominion Cannery's prices, and this he had placed before the officers of that association. He then promised to turn all his effort to the selling of the goods irrespective of the Dominion Cannery or any organisation. His threatened telegram was sent with this letter. This telegram was to be in the name of Barry & Sons, advising that that firm had purchased from the Independent Cannery and controlled all unsold goods of 1914 pack. To this Barry replied next day, by wire: "Not losing nerve, but bank insists covering overdraft and meeting payment. Must sell or arrange to get fifty or sixty thousand, December 1st. Wire fully collect." The reply to this is not produced. It was probably a request for a meeting, as Barry wired Durocher on the 21st November: "Impossible: have to go to New York Monday; think you had better come down to-night."

On the 23rd, Barry wired, apparently in response to some other message, that he was leaving for New York, but would go to Toronto, "if you wire me to-day that you will then be in a position to conclude definite arrangement without further delay." Barry went to New York, returning to Montreal on the 27th;

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and on the 28th the draft already mentioned was presented, which was the first intimation Barry received that Durocher had been exceeding his authority. He wired that day to Durocher: "Everything stopped; you must come down to-night and bring all contracts and documents with you." Mr. Barry attempted to see his solicitor, but the latter was out of town. Next day was Sunday. On the 30th, after consulting his solicitor, Barry wired Durocher: "You must not sign our name to any correspondence or document unless authorised;" and also, by another wire, "Must repudiate option you exercised without authority," and instructing notice to be given to Flynn, a merchant who also had an unauthorised contract, and stating that Barry would himself send such a notice. A third telegram appears to have been sent on the same day, "Have you received any definite offers?" Durocher's reply, sent, as stated by Mr. Thomas, when Durocher was intoxicated, was, "Cannot repudiate contracts and will not do so." Barry then sent out letters, dated the 1st December, to all those with whom he thought Durocher might have had dealings, repudiating any authority in Durocher. From that time on there were communications, but in none of these was there any ratification of what had been done by Durocher.

The situation seems to me plain upon the facts. Durocher never had any authority; there never was any ratification; and there never was any holding out by Barry. This being so, the plaintiffs must fail.

In scrutinising the documents produced, the real question must be kept clearly in mind. The correspondence between Barry and Durocher may justly be looked at carefully to ascertain whether credence should be given to the statements made by both that Durocher had no authority; but documents which were never communicated to the plaintiffs must not be looked at with a view of seeing whether possible inferences might be drawn if these were evidence upon the holding out branch of the case. That branch of the case must rest on holding out to the plaintiffs, either directly or indirectly.

Upon another branch of the defence the plaintiffs must, I think, also fail. Mr. Millman, who says that he regarded Durocher as Barry's broker or agent, agreed to divide with Durocher

the commission which he as vendor's broker would be entitled to receive. Mr. Millman seeks to shew that that division was not to be with Durocher, but between Millman and Barry & Sons. I cannot so find upon the evidence.

In *Hitchcock v. Sykes* (1913), 29 O.L.R. 6, I stated my view (p. 14) that the payment of any sum to any person occupying any fiduciary position, by way of secret commission, is fraudulent and cannot be permitted to be explained away, and that, as held in *Panama and South Pacific Telegraph Co. v. India Rubber Gutta Percha and Telegraph Works Co.* (1875), L.R. 10 Ch. 515, any surreptitious dealing between one party to a contract and the agent of the other party is a fraud in equity, and invalidates the agreement. Although this was said in a dissenting opinion, that view was subsequently sustained (see the judgment of the Court of Appeal, 29 O.L.R. at p. 17 *et seq.*, and *Hitchcock v. Sykes* (1914), 49 S.C.R. 403); and I am informed by counsel who presented a petition to the Privy Council for leave to appeal, that their Lordships expressly assented to this view.

The action therefore fails, save as to the \$400 for storage. This forms a very small portion of the controversy, and ought not substantially to affect the incidence of costs. The plaintiffs will have judgment for \$400 and costs fixed at \$75. The defendant will have the costs of the action, save any that relate solely to the \$400, these amounts to be set off *pro tanto*.

At the trial I gave leave to amend by setting up the payment of the commission. This amendment ought to be made before the judgment issues.

The plaintiffs appealed from the judgment of MIDDLETON, J.

March 14 and 15. The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and MASTEN, JJ.

I. F. Hellmuth, K.C., and *J. G. Kerr*, for the appellants, argued that the evidence clearly established the general agency of Durocher for the defendant, and that the purchases in question were within the scope of his agency. At all events, the defendant was estopped from denying the agency, on account of his intimate relationship with Durocher, and his holding him out as his agent: *Holt v. Schneider* (1899), 77 N.W. Repr. 1086;

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Bowstead's Law of Agency, 5th ed., p. 21. The learned trial Judge's view of the law was wrong when he held that, if a purchaser's agent received a commission from another than his employer, the transaction in which the commission was received would be thereby vitiated. Such a contract would be set aside only if there was fraud in the giving or taking of the commission: *Pole v. Leask* (1863), 33 L.J. Ch. 155; *Rowland v. Chapman* (1901), 17 Times L.R. 669; *Alvord v. Cook* (1899), 174 Mass. 120. Here there was no fraud. In fact, the defendant knew of the commission being given by Millman to Durocher.

R. McKay, K.C., for the defendant, respondent, contended that the judgment appealed from was correct, for the reasons given therein. The evidence, if carefully read, shewed that Durocher was not the agent of the defendant in the transactions in question. They were outside the scope of his authority altogether. They were never ratified; nor was there any holding out by the defendant. The law as to receipt of a commission by an agent vitiating the transaction in which it was taken was correctly stated by the learned trial Judge, and was so laid down in the authorities cited by him in his reasons for judgment.

Hellmuth, in reply.

April 14. MEREDITH, C.J.C.P.:—The trial Judge said that this is a case in which one of two innocent parties must suffer from the wrong-doing of a third person: if so, the word "innocent" must be a very elastic one, and in its use, or misuse, may sometimes cover a multitude of sins. The plaintiffs' innocence in this case consisted of entering into an ordinary contract of sale of goods, to the defendant, in the usual manner of merchants' dealings the one with the other; the whole correspondence between them having been carried on directly through His Majesty's post offices. The innocence of which the defendant was guilty was in placing in the hands of his "dear" friend and associate, the witness Arthur Durocher, the weapons by which, if the judgment in appeal stand, the plaintiffs shall have been "bled" to the extent of about \$8,000, largely in the defendant's own counting-house.

The plaintiffs, in ordinary mercantile methods, by correspondence, conveyed in the public mails, and properly directed

to the defendant, entered into negotiations with him—in answer to a letter from him so conveyed to them, which letter was the beginning of all the business between the parties to this action—which ended in the contracts in question being made: and these simple indisputable facts make, as it seems to me, a strong *prima facie* case of a legal right to enforce those contracts in this action. Then how is that case met? Not by evidence that the plaintiffs' letters were stolen, and the answers to them forged, by the writer of them for his own gain. On the contrary, it is admitted: that the plaintiffs' and their brokers' correspondence came, in due course, to the defendant's office, and that, under his directions, but during his absence, they were given to the witness Arthur Durocher, to be dealt with and answered by him; in the defendant's office, where his office desk, and work, was, and was done, and had been for some considerable length of time; that such correspondence was so dealt with there, the defendant's answers to the plaintiffs' and their brokers' letters being either written by the witness Arthur Durocher, or written by the defendant's stenographer upon his dictation, all upon the defendant's business stationery, and in all things, even to the postage stamps, dealt with as the business letters of the defendant; and that all were signed in the firm name in which the defendant was carrying on business—some with only his rubber stamp signature, kept for that purpose—but some having in addition the word "per" and the letter "D." or the signature "A. Durocher" following it.

A number of contracts were thus made, for the purchase of goods such as those in question, all signed by Durocher in the firm's name per himself; and most of them have been carried out by the defendant as his contracts, although the authority for making most of these seems to be now denied by the defendant in the same manner as the authority to purchase those in question is. Among the contracts so made was one, at least, with the plaintiffs, the validity of which was never questioned, and which has been carried out, and that was the first contract between these parties. But it is now said: that the making of the contracts in question, which were parts of larger ones "split up" among several other manufacturers as well as the plaintiffs, was not authorised by the defendant, and that, although made in substantially the same way as all the contracts which have been carried out, the defendant is not liable upon them.

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The circumstances under which it was made are these. Until some time in the earlier half of the year 1914, the defendant had not dealt in such goods as those in question—commonly called “canned” or “tinned” goods. His friend and associate, the witness Arthur Durocher, had; and, when the defendant did enter into this branch of trade, he did so evidently depending upon Durocher and his knowledge and skill in it. The defendant’s story is, that he authorised the purchase of only twenty thousand cases, but Durocher bought, according to the defendant’s testimony, ninety-four thousand, for all of which the defendant accepted and admits liability. The market was stagnant, and, if nothing were done to avert it, there would be great loss upon the goods thus purchased; and, besides that, the defendant was not in a position financially to carry so large a load of stagnant stock.

In these circumstances, there seems to have been but one of two things to be done: submit to the loss, which is always a hard thing to do; or else “corner the market,” which being interpreted means get substantial control of some particular marketable produce in such a way as to be able to control its market price and then sell to great advantage, an heroic remedy as well as an alluring and exciting undertaking: the witness Arthur Durocher naturally preferred this course; and his familiar and confiding friend, the defendant, assented to and took part in an effort to relieve the situation and make much money in this way; and, as in all the “canned goods” transactions, this one was left in the hands of the witness Arthur Durocher; and, more than that, all the defendant’s letters upon the subject were handed over to him, because the operations were intrusted to him. Much negotiation took place; an office was opened in Toronto in the defendant’s name, with money supplied by the defendant; twice, I think, the defendant came to Toronto solely about, and took part in, these operations; and was fully advised by letter and telegram of them. After varying fortunes, and earnest efforts to make the heroic remedy a success, it ended in failure, leaving on the defendant’s hands, if the contract in question binds him, one hundred and seventy thousand cases more of “canned goods” than he had before, of which the twenty-three thousand in question in this action formed part.

The loss is a very considerable one: and the failure of the heroic remedy, a very serious one: so serious that naturally the

defendant is extremely anxious that the loss should fall upon any one rather than upon him. But how can he escape? The means adopted for that purpose, and very forcefully urged by Mr. McKay in his behalf throughout this action, is: that really he had nothing to do with this attempted remedy for his overstocked condition, and coup by which he was to be so much enriched: that it was entirely an affair of the witness Arthur Durocher, carried on against the defendant's wishes and without any kind of authority from him.

But how can such a contention succeed, in the face of the indisputable main facts of the case? The whole thing began, and was carried on throughout, with his knowledge and consent, in his business name, a name long used by his father before him as well as himself, and a name well known and trusted in and by the business community: and which began, and was carried on to conclusion, in connection with correspondence addressed and sent, in the manner I have already mentioned, to the defendant, and correspondence in answer to such correspondence, coming in all things as if in due course from the defendant. The new office, in Toronto, was opened in the way and with the means I have mentioned, and the defendant in person went from his place of residence or from New York to Toronto once or twice for the sole purpose of seeing about the buying up operations, and in person took some part in them.

Among the many evidences in writing making it impossible to come to any other conclusion, let me refer to two only: the heart-courageous telegram: "Not losing nerve, but the bank insists . . . ," sent by the defendant to the witness Arthur Durocher more than a month after the purchase of eleven thousand cases of the goods in question: and the telegram of the 26th November, sent somewhat broadcast in the defendant's business name, announcing the purchase of all the Independent Cannery's goods, and fixing prices, of which telegram the defendant had knowledge, but never in any way repudiated.

It is not a question whether the defendant assented to, or did not assent to, any particular sale: that narrow view of the case seems to have led to some serious misconceptions of the parties' rights: there was the general power, and the authority, to use the defendant's name in these operations; they could not

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have been carried on without that; no one would have wasted an hour upon any scheme that had no more than the credit, financially, of the witness Arthur Durocher behind it: the defendant knew this; no one concerned in the matter could help knowing it; and, in view of the manner in which the correspondence began and was carried on throughout, the purchases made by Durocher and treated by the defendant as binding upon him, the opening of the office in Toronto, and the defendant's personal participation in the negotiations for the purchase of a controlling interest in the output of the "independent" factories, with a full knowledge that all had been done and was being done in his name and on his credit, how is it possible for him to escape liability on the contract in question merely because he did not give any specific authorisation respecting it? It is idle to contend that all that was done and authorised by the defendant was done and authorised merely for the purpose of selling his goods on a stagnant and impossible market.

The trial Judge took quite too narrow a view of the evidential purposes to which the correspondence between the defendant and the witness Arthur Durocher might be put; it is helpful, very helpful, on the question of estoppel, in so far as it contains admission of facts and circumstances relied upon by the plaintiffs as having led them into the contract as being one really made with the defendant.

I agree with my brother Lennox in the view expressed in the the observation, made by him during the argument, that there was sufficient evidence, adduced at the trial, to put upon the defendant the onus of proof that the goods in question are not part of the ninety-four thousand cases regarding which the defendant admits liability: the knowledge and the proofs, upon that question, are altogether with him; and, not having been given, or until given, it should be held that they were. But I do not put the now admitted liability of the defendant for the seventy-four thousand cases, which he would have us believe were bought without his authorisation, upon the ground of ratification: it is much better put upon the ground of the previous, general and undisputed authority.

Another circumstance, whatever may be its weight, supports that view of the case; the defendant and the witness Arthur

Durocher were in such confidential and familiar relations the one to the other that some of the defendant's letters, although dealing altogether with business matters, begin "Dear Arthur" and end with the signature "Dick;" whilst some of the letters of the witness Arthur Durocher to the defendant begin with the words "Dear Richard" and are signed only "Arthur;" and, as I have mentioned, the witness Arthur Durocher had his place of business in the defendant's counting-house, made use of the defendant's stationery and postage stamps, had writing done by the defendant's stenographer; and, by the defendant's order, was given all the defendant's correspondence relating to "canned goods" to be read, attended to, and answered by the witness Arthur Durocher for the defendant: and, as the defendant was much away from his office during the summer, and there appears to have been no one else put in charge of it, it is but a short step to the conclusion that the witness Arthur Durocher was.

So, too, when failure became evident to the defendant, he hastened to relieve himself if he could from his liability. His telegram to the witness Arthur Durocher to repudiate the contracts as unauthorised and the latter's blunt refusal and denial of right to do so; the long lesson by telegraph given by the former to the latter regarding excess of authority and so forth and what to say and do; and the other circumstances attending this period of the transaction are all quite unlikely if the case were one of no liability because of no authority, very likely in a case such as this was of authority, unwisely given and ending in loss, the consequence of which it was sought to be got rid of.

And so, too, of the defendant's denunciation in unmeasured terms, through his counsel, of his familiar friend and associate; denunciations to the extent of accusations of robbery and perjury; and assertions that the man ought to be in the penitentiary; the dramatic effect of which, however, was spoiled by the subsequent assertion of counsel for the plaintiffs, not contradicted, that "dear Richard" and "dear Arthur" are still carrying on business in the same way and the same Montreal counting-house, protected and comforted by the judgment in appeal.

I cannot but find, upon the whole evidence, that the purchases in question were purchases within the authority of the witness Arthur Durocher, acting for and in the name of the defendant,

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carrying on business as John Barry & Sons: and that, if that were not so, the defendant is plainly estopped from denying that the contracts in question are his contracts.

But, after being asked to swallow the camel of the defendant's "innocence," involving more than \$8,000, we are urged to strain at the gnat of the divided commission, amounting to a few hundred dollars, and upset this whole transaction on the ground of fraud in it.

The commission transaction was this: Millman & Sons have by some means become the sole brokers for the "independent" canning factories, of which the plaintiffs own one; a commission of two cents the hundred is allowed to them upon sales made by them; and it is quite usual, according to the witness Millman's testimony, and there is nothing to the contrary, for them to divide that commission with the purchaser or purchaser's broker; a thing that seems to be quite well known in the trade. Millman & Sons agreed with the witness Arthur Durocher, who was treated by them as representing with authority the defendant, representing him, as it was put in some of the defendant's correspondence, as "our Mr. Durocher," to divide the two per cent. commission in the usual way, and that was done, and "our Mr. Durocher" received, I understand, the half commission on the transactions carried out by the defendant.

And in the correspondence between Millman & Sons and the defendant, carried on in the way I have more than once mentioned, the arrangement for the "splitting" of the commission was very plainly stated. It is said that the letter in which it was so stated had upon the envelope the words "Attention personal Mr. Durocher;" but I cannot think that that detracts from its effect as notice to the defendant of this arrangement. There is nothing to shew, but the contrary should be found on the whole evidence, that this letter was not dealt with under the defendant's general direction, that is, opened by his clerk and handed to the witness Arthur Durocher as a letter dealing with that branch of the defendant's business which he had put in the charge of Durocher, or so handed to him unopened. The words "Attention Mr. So and So," or "Attention personal Mr. So and So," written on the envelope of business letters, have come into common use, in some business communities, in recent years, the

purpose being to direct the attention of the person or concern to whom or which the letter is addressed to the fact that it relates to a matter which has had, or is having, the personal attention of Mr. So and So. But it is none the less the post letter of the person to whom it is addressed and not of Mr. So and So, who, without the authority of the person or concern to whom or which it is addressed, has no right to, or in, it any more than if it had not had upon it the words referring to him.

The trial Judge seems to have been carried away by the notion that, if the purchaser's agent receive a commission from one who is not his employer, the transaction in which the commission was received cannot stand. It need hardly be said that that is not the law. In such cases it is fraud, and fraud only, that has that effect: the defence on this ground, added by leave at the trial, puts it thus: that the contracts in question were "procured by fraud, bribery, and improper dealing." The payment may or may not be fraudulent: the payment of a commission is nothing more than evidence of fraud. If a seller bribe an agent, of a buyer, to buy from him, the seller is guilty of fraud and cannot ordinarily enforce the contract: that is obvious: though at one time it was ruled that the contract was not vitiated unless "the operation of the gratuity was to influence the mind of the agent in a manner favourable to the party offering it"—in other words, unless the fraudulent act bore fruit: and that whether it had such effect or not was of course a question for the jury: *Smith v. Sorby* (1875), 3 Q.B.D. 552 (note); but, soon afterwards, that ruling was modified, and the existing rule established, namely: that where a person in the employment of another is bribed with a view to inducing him to act otherwise than faithfully to his employer, the agreement is a corrupt one and unenforceable at law, whatever the effect produced on the mind of the person bribed might be: *Harrington v. Victoria Graving Dock Co.* (1878), 3 Q.B.D. 549: and of course all questions involved in such a defence of fraud are questions of fact to be found by the jury in cases tried by a jury. One must not confuse, as is sometimes done, the right to set aside a transaction, on such a ground of fraud, with the right of the employer to recover from his agent the commission or other benefit, which the agent had a right to receive only for his master's benefit. The case of *Hippisley v. Knee Brothers*, [1905] 1 K.B. 1, affords an illustration of this: there the "secret profit" was received by

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the agent in good faith; and accordingly it was held: that, though the principal might recover from the agent the "secret profit;" the taking of it, and the making of the agreement between principal and agent with the intention of taking it, did not vitiate that agreement, or prevent, in any way, the agent from recovering from his principal the commission he had agreed to pay the agent. And the case *Great Western Insurance Co. v. Cunliffe* (1874), L.R. 9 Ch. 525, affords an instance not only of the receiving the secret commission not being a fraud vitiating anything, but indeed of the agents being held entitled to retain the "secret commission;" and the dismissal of an action brought by the principal to recover it from them. I quote these words from one of the judgments, because they are the words of a Judge who was temperamentally so opposed to commissions, gratuities, and presents, to servants and agents, that in reading some of his judgments it is impossible to quite keep out of mind the proverbial "red rag:" "I believe that the principle is correctly laid down in the case of *Queen of Spain v. Parr* (1869), 39 L.J. Ch. 73, 76, but the questions here are, whether the agent has been otherwise reimbursed and whether he has received a gratuity which his principal is supposed to be ignorant of."* The case of *Baring v. Stanton* (1876), 3 Ch.D. 502, is another case of that kind; and it also contains observations applicable to this case, for instance (p. 505): "If a person employs another, who he knows carries on a large business, to do certain work for him as his agent with other persons, and does not choose to ask him what his charge will be, and in fact knows that he is to be remunerated not by him but by the other persons—which is very common in mercantile business—and does not choose to take the trouble of inquiring what the amount is, he must allow the ordinary amount which agents are in the habit of charging;" in that case the commission was received from the principal's customer.

Now, what are the circumstances in this case? The defendant neither paid, nor agreed to pay, "our Mr. Durocher" anything for his services: the defendant paid his expenses out of pocket in the "canned goods" business, including the expenses of the Toronto temporary office: the defendant knew that the man could not live upon air alone; the "splitting" of the commission

*James, L. J., at p. 536.

was one of those things that are "very common in mercantile business:" the men are on most familiar and confidential terms with one another; it is impossible to believe that the commission received was a secret one or that there was anything like fraud in its payment, made, or to be made, or bad faith in any way: and, as I find, the defendant had formal notice of it in the communication I have referred to. Whatever else may be said against the witness Arthur Durocher, and a great deal may be said, no man can truthfully say that he was disloyal, that from first to last he has been anything but very loyal—in his testimony quite too loyal—to his friend and associate, the defendant. And, in addition to all that, it is very plain to me that this defence to the action is in truth only a solicitor's defence, and a solicitor's defence raised only at the eleventh hour—at the trial: I should not have given leave then to plead it, because admittedly the plaintiffs were entirely without part in or knowledge of it.

The cases referred to by the trial Judge are extremely unlike this case: in the case of *Panama and South Pacific Telegraph Co. v. India Rubber Gutta Percha and Telegraph Works Co.*, L.R. 10 Ch. 515, the defendants, having contracts with the plaintiffs for the doing of work costing about a million and a half of dollars, bribed, as it was found, the chief engineer of the plaintiffs, upon whose certificate the price of the work was to be paid.

The other case, *Hitchcock v. Sykes*, 29 O.L.R. 6, 49 S.C.R. 403, was one in which there was a good deal of conflicting judicial finding; and was one in which vendors had paid, or agreed to pay, a secret commission to the agent of one of two purchasers, the agent being the other purchaser. Eventually an application for leave to appeal to the Privy Council, made by the party who had appealed to the Supreme Court, was unsuccessful: but how could it be otherwise; how could any one reasonably expect that it could? The question was one of fact only; whether the sellers were guilty of fraud against the one purchaser; a question in which the parties themselves alone were concerned; and a case which, being decided on its facts, could not govern any other case.

And yet there is another ground upon which, in my opinion, the trial Judge erred on this branch of the case: no one suggests that the plaintiffs were in any manner connected with, or had any kind of notice or knowledge of, the splitting of the commission

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transaction; on all hands it is admitted that they are quite innocent, really innocent in that respect: so the question arises whether they would be answerable for their brokers' wrong-doing, if the brokers had done wrong, in splitting the commission. Millman & Sons unquestionably would: but it by no means follows that the plaintiffs would: the rule governing the liability of a principal for the fraud of an agent is thus stated by Willes, J., in delivering the judgment of the Court in the case of *Barwick v. English Joint Stock Bank* (1867), L.R. 2 Ex. 259, 265: "But with respect to the question, whether a principal is answerable for the act of his agent in the course of his master's business, and for his master's benefit, no sensible distinction can be drawn between the case of fraud and the case of any other wrong:" see also *S. Pearson & Son Limited v. Dublin Corporation*, [1907] A.C. 351.

Assuming that Millman & Sons had bribed the witness Arthur Durocher, and every one else with whom they divided commission on independent factories' goods sales, how can it be found that that was in the course of the independent factories' business and for their benefit? Why not in the course of their own business and for their own benefit, to make their own half of the commission? And, if it be put on the ground that the plaintiffs cannot take advantage of their brokers' fraud; what evidence is there that they obtained the contracts or any kind of advantage by it? The witness Arthur Durocher was not hunting for gnats: it was very large game only that he sought: nothing less than controlling the market and winning a fortune, or that which would be a fortune to some men; and all this, in a legal sense, solely for the benefit of his dear friend and associate, the defendant, relying upon such friendship and the moral right involved in it only for any share, in the fortune, to come to him.

One more circumstance I mention, though of no great moment: the trial Judge, apparently through a lapse of memory, said that the witness Millman had testified that he regarded the witness Arthur Durocher as the defendant's broker. I can find nothing in the evidence to support that; on the contrary, the witness Millman firmly denied that he ever knew that the witness Arthur Durocher was a broker; denied that he had ever, before these transactions, had any dealing with him, except on one occasion, when he bought for himself.

I would allow the appeal, and direct that judgment be entered for the plaintiffs and damages in such amount as the parties may agree upon, or, if unable so to agree, as the proper local officer may, on inquiry, find that the plaintiffs have sustained by reason of the defendant's breach of his agreement to buy the twenty-three thousand cases of "canned goods" in question: the successful parties are entitled to their costs here and below.

It is hardly needful to say that I recognise the hardship of the load falling altogether upon the defendant; that it would have given greater satisfaction if it could be a divided loss; but justice must be done: and it is only just to add that, having taken the chances of winning all, all rules of all games require that the defendant should bear all loss.

LENNOX, J. (after referring to and quoting from the judgment of MIDDLETON, J., *supra*):—With very great respect, it is not quite clear to my mind that "it may be taken for granted . . . that Durocher had not in fact any authority to make the contracts" in question, or that "general authority" is always the equivalent of "general instructions." If a dealer in merchandise commits to an agent, say Durocher, the sole management of one branch of his business, constitutes him the purchaser of all goods of a certain class, houses him at his place of business, leaves him in control during frequent and long absences of the employer, commits to him the inspection, purchase, storage, insurance, sale, and management incident to the carrying on of this branch of trade, and authorises him to conduct the negotiations and carry on correspondence in the name of the employer and without his intervention, if the alleged limitation upon quantities to be purchased from time to time has been invariably exceeded by the agent and as invariably disregarded by both, if the employer adopts these *unauthorised* contracts, accepts and pays for the goods, and, without complaint and conscious of his agent's methods, sends him out again and again to purchase more, and if this is all part of a premeditated scheme to form a combine, force the hands of the Dominion Cannery, control and "boost" the market, and enhance prices—a huge gambling deal, involving secrecy, risk, prompt action, and financial obligations of uncertain limit—and all to be brought about by the sagacity, strategy, and daring of the employer's confidential representative, Durocher, his hitherto

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unrestrained and unrestrainable wizard of finance—if this is the effect of the evidence, and it is very like it, I am unable to see how it can be unhesitatingly affirmed that “there never was any relationship of master and servant” (or principal and agent or partnership) or that “Durocher never had any general authority” (actual or ostensible, or to be implied) “from Barry” to enter into the contracts in question. What had Durocher the right to infer, after a number of “excesses,” from the general course of dealing? I am for the moment only referring to the out and out, direct purchases—not to the option, if any distinction is to be made.

On the 19th November, 1914, the plaintiff company wrote John Barry & Sons that they were drawing upon them to cover the two sales. It is not shewn, I think, that this letter was posted on that day, or in fact that it was posted at all. On the 23rd, the company appear to have made out bills or invoices charging the defendant with the amounts of these two purchases, \$16,879.50 and \$18,000.

On the 28th November, the plaintiff company drew upon the defendant for these two sums. I do not find any specific evidence either way as to the letter of the 19th November, but the trend of Barry’s evidence is to shew that he knew nothing whatever of either of the contracts sued upon until the 28th November, when he returned to Montreal, after an absence beginning on the 23rd.

There are three questions to be determined:—

(1) Was Durocher in fact authorised to enter into the alleged contracts?

(2) Is the defendant estopped from denying that Durocher was authorised?

(3) Was there a secret commission invalidating the contracts?

I will deal with the last question now, as, if it can be answered affirmatively, there is no need to go further. It is so much a question of fact that no nice point of law arises; and the reliable evidence in this case is documentary. That the divided commission was not intended as a dishonest or fraudulent inducement, or to be kept from the knowledge of the defendant, is manifest from the correspondence. The contracts ought not to be avoided upon this ground.

The first branch of the claim, for eleven thousand cases contracted for on the 5th October, 1914, can, I think, be safely

determined by a careful examination of Mr. Barry's letter to Durocher of the 8th October, 1914, in reply to Durocher's letter to him of the day before, the admitted confidential relations, common purpose, and course of dealing established between these two men, and Barry's total inability to account for a liability for ninety-four thousand cases of tomatoes mentioned in his letter, without including in the ninety-four thousand the fifty thousand cases purchased by Durocher on the 5th October, and of which the eleven thousand cases sued for is the part allotted to the plaintiff company.

In this letter Mr. Barry says: "Yours of the 7th received and noted. I already owe the bank over \$140,000, to cover payments falling due on your purchases up to November 5th, and I do not wish to incur any more liability, or borrow any more money, as I have all I can carry, and have not the Bank of Montreal at my back. Now, in addition to this, you have made purchases of a total of ninety-four thousand cases tomatoes, twenty thousand cases of which, at 77½ cents to 80 cents, are payable thirty days from date of shipment, and seventy-four thousand cases are payable net sixty days from date of shipment. You have also contracted for five thousand cases pease at 67½ cents and eighteen thousand five hundred cases at 90 cents less 10 per cent., payable in ten days, and, in order to carry out *our* contracts, it will be necessary to sell most of the goods already paid for. It is all very well for you to say *at this stage* that the only way is to try and gobble up all the tomatoes left unsold in the hands of the Canned Goods Limited, and also those outside, a total of two hundred thousand cases, a liability approximately \$300,000; but it is impossible for me to do this single-handed, as I am already tied up for more than I can carry. If you can obtain an option from Canned Goods Limited, and then make a deal with Dominion Cannery, well and good. Failing this, I cannot see where you can figure out on making any money. In any case, you will have to make an extra effort to sell some of this stuff, as I will have to meet my notes as they become due, and uphold my credit with the bank."

In this letter Barry goes minutely into his purchases and liabilities through the agency of Durocher. He points out that, in addition to owing more than \$140,000 to the bank, there are other purchases of tomatoes made by Durocher, aggregating

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ninety-four thousand cases, seventy-four thousand of which are payable "net 60 days from date of shipment," and a lot of other minute details.

I cannot read this letter, full of figures and dates as it is, without coming to the conclusion that Mr. Barry is possessed of an exceptionally good memory, or that it was compiled from records of purchases then in his possession. The theory of a good memory is completely dispelled upon reading his examination for discovery and his evidence in Court. Assuming that he is honest, and was anxious to make full disclosure, I would judge that he has a very defective memory indeed. The alternative is inevitable, namely, that he consulted records, and from them obtained the detailed statements contained in his letter, including the ninety-four thousand there spoken of as a liability to be provided for. The very pertinent question necessarily arises, what purchases created this liability? And this question became an acute issue as early as the defendant's examination for discovery. There was no room left for doubt, then or thereafter, as to the attitude of the plaintiff company—the contention that the ninety-four thousand cases included a fifty thousand case purchase, of which the eleven thousand sued for is the company's allotment. This was followed by a statement of the defendant's liabilities for stock purchased by Durocher; and, if the fifty thousand cases are not included, counting as of the 5th or 8th October, there is a huge discrepancy somewhere. But neither during that examination, in the first instance, nor after it was adjourned and resumed, nor at the trial, was the defendant able to account for this ninety-four thousand purchase and liability, even approximately, without including the fifty thousand cases in dispute. His books and office records, if produced, however meagre they may be, would have gone a long way towards settling this question either for or against the defendant; but they were never produced. Why not? Nobody could be in doubt as to the incidence of this question. It is impossible to believe that the defendant, or his solicitors or counsel, could fail to appreciate its relevancy and importance. Why was this matter allowed to remain hazy and indefinite? As to twenty thousand cases included in the ninety-four thousand, the parties seem to be in agreement that they were purchased from E. B. Smith, and the terms mentioned for the twenty thousand, I think, coincide with the Smith terms. Millman

swears that he sold Barry, through Durocher, the fifty thousand, another lot of twenty thousand, and two lots of two thousand each, making just the unaccounted for seventy-four thousand cases. Millman's evidence is perhaps none of the best; but there was nothing to prevent Mr. McKay, if he deemed it advisable, from putting the matter to the test by asking this witness, "Who were the vendors in the three transactions aggregating twenty-four thousand cases?" And the defendant, subsequently called, was not asked if the three transactions aggregating twenty-four thousand cases were entered into as a matter of fact. Again why?

"Net 60 days from date of shipment" is, I understand, one of the most favourable alternative terms of the fifty thousand case contract, and it is to be presumed that Millman, representing Canned Foods Limited, if he sold the twenty-four thousand he speaks of, complied with the provisions of his patron's agreement by selling the goods of all upon the same terms. Barry's letter speaks of twenty thousand (Smith's), on one set of terms, and seventy-four thousand, on other terms as above. Why were the lots mentioned in the letter grouped in this way? Barry suggests that his estimate of liabilities may not have been accurate, but does not shew that it was not, and seventy-four thousand cases, or \$100,000, is not a trifling discrepancy. Durocher, who knew of every purchase, and would naturally be anxious to minimise liabilities, made no correction.

This letter was written just three days after the date of the fifty thousand case contract.

With very great deference for the opinion of the trial Judge, and realising, too, that he had opportunities for judging of the character of the verbal testimony which I have not, I feel compelled, upon a careful examination of the undisputed facts, the admitted relationship of Barry and Durocher, this unexplained discrepancy, and the documentary evidence generally, to conclude that, whether Durocher had actual antecedent authority to purchase the fifty thousand cases, or not, Barry knew and approved of it and included it as a liability when he wrote the letter of the 8th October; and the defence fails upon this item of claim.

I had greater difficulty in reaching a conclusion, either way, founded upon the option of the 12th October, and accepted by

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Durocher, in the name of the defendant, on the 7th November, 1914. If Mr. Barry's letter of the 8th October was more than cautionary as to the future—if it could be read as an abandonment of the scheme he and Durocher were engaged in, a cancellation of the authority which unquestionably continued up to that time, it would aid the defendant in his defence, though it would not be conclusive as to liability. But it must be read in the light of conditions as they then existed in relation to the vendors, the enterprise which John Barry & Sons had launched, the transactions already consummated with these vendors, through Durocher as the accredited medium, and in the light of the antecedent and subsequent communications—as far as they can be ascertained—between the principal and the now repudiated agent. Did Barry turn his back upon the enterprise, and sever the connection on the 8th October? "If you can obtain an option from Canned Foods Limited," says Mr. Barry, "and then make a deal with the Dominion Cannery, well and good. Failing this, I cannot see where you can figure out on making any money." But the man whom he foolishly regarded as a financial giant is to keep on and in some way get the money so urgently needed, and lose no time in getting it. Just as well as if he had personally conducted the bargaining, Barry knew what was going on, and that Durocher was regarded as his buyer and general representative, without limit, by Millman and his patrons; and, knowing this, Barry does not even tell his agent to break off; on the contrary, the *status quo* is to be maintained, and was maintained, as the subsequent correspondence shews, until the crisis on the 28th November; and then he says, for the first time, "Everything is stopped." Can Barry now say that everything was stopped on the 8th October? And why does he wire, on the 30th, "You must not sign our name to any correspondence or documents unless authorised?" What was stopped on the 28th, and what had been going on, to the knowledge of Barry, until then? The principle determining the question of liability upon this item of claim is not in all respects identical with that to be applied to the sale of the 5th October—here the ostensible authority of the agent becomes important—but it is impossible to divorce the second transaction from the first, or either of them from the earlier undisputed purchases from the same parties, through the same agency, in determining what sellers would have a right to

imply and rely upon. If this condition was to be put an end to, there was a legal duty to notify the vendors.

On the 26th November, with Barry's knowledge and approval, Durocher sent a night letter to the wholesale trade of Canada, signed John Barry & Sons, stating that they had purchased the entire stock of the Independent Cannery (the one hundred and twenty-five thousand cases, which includes the 12,000 sued for) and solicited wired contracts for the goods, at prices named. Was Mr. Barry not aware of the twelve thousand case purchase at this time? He was offering to sell them as the property of John Barry & Sons. If acceptances had been wired, what would be the position of the firm?

Year after year, our great departmental stores send out their buyers to European capitals, and all of them with more or less specific instructions. If upon occasion after occasion the agent exceeds his instructions, but time after time the goods are accepted and paid for without question or complaint, can the company, after a connection and a course of dealing has been established, suddenly and without notice, repudiate the contract and resist payment simply upon the ground that the old excess has been repeated—can they even refuse to pay their buyer his customary remuneration? Would not the answer in both cases be: "It is not what you said but what you have sanctioned time and again." And these agents are not acting in pursuance of a comprehensive scheme to corner the market and enhance prices. I cannot help feeling sorry for Mr. Barry—I would prefer that the producers should each be confined to the actual value of his goods rather than that an enormous loss should be borne by Barry alone—and the damage here is only a tithe of a possible total liability—but it must sometimes happen that the gamester is beaten at his own game.

I think the appeal should be allowed and judgment entered for the plaintiff company, upon both branches of the claim, with costs here and below; but a part of the incidental expense claimed is not recoverable, and there should be a reference as to this if the parties cannot agree.

MASTEN, J.:—In his reasons for judgment the learned trial Judge says: "Mr. Barry acted, I think, throughout, with perfect honesty, and I accept his evidence without question."

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Turning to Barry's evidence, at p. 198, line 26, he is asked:—

"Q. Then, speaking with reference to both contracts, the eleven thousand cases and the twelve thousand cases, the exercise of the option, had you any knowledge at all of them as existing for any definite amount prior to November? A. No, sir.

"Q. Had you given any authority? A. No, sir, none whatever.

"Q. To Mr. Durocher to enter any such contracts? A. No, sir."

In view of the statement of the learned trial Judge which I have just quoted, this evidence is conclusive to my mind: (1) that Barry gave no express authority to Durocher to pledge his credit; and (2) that Barry never had any intention of doing or saying anything to authorise Durocher to pledge his credit in the purchase of "futures," as they are called in the evidence.

Further, there is no doubt in my mind that originally in connection with the first purchase the position of Durocher was that of a special agent, and not of a general agent.

The definition of a special agent given in Bowstead on Agency, p. 4, is as follows: "A special agent is an agent who has only authority to do some particular act, or represent his principal in some particular transaction, such act or transaction not being in the ordinary course of his trade, profession, or business as an agent."

Durocher was not a regular broker in canned goods, and in fact had been engaged, so far as he had been engaged at all, in entirely different lines of business. Barry's regular business was that of a wholesale importer of and dealer in green tropical fruits. The house was a well-known house, of excellent reputation, but confined to that branch of trade. He had never dealt in canned tomatoes or other like merchandise. That was not his business. He had no organisation for the purpose. Durocher was not a permanent employee of his, was not obliged to devote any particular part of his time to the business: and this was in fact a special and separate venture, just as the parties might have gone into the stock market to buy shares for purposes of speculation.

The beginning of all was that Barry specially authorised Durocher to buy for him canned tomatoes at from 70 to 72½ cents, on what were characterised as "spot purchases," which I under-

stand to involve an immediate draft by the purchaser on Barry at thirty days, covering the purchase-price. The amount to be invested was not to exceed \$20,000. Under those circumstances, I think there can be no doubt that in the beginning Durocher was a special agent, within the definition which I have quoted; that he had not authority to pledge Barry's credit; and that, if the plaintiffs were suing on a contract made through Durocher at that time, they must fail.

A careful perusal of the evidence and of the exhibits has compelled me to the view that, at some subsequent time prior to the date of the contracts here sued on, the business changed, and that Durocher became in fact the general agent of Barry in the buying and selling of canned tomatoes, pease, and other like merchandise. This conclusion rests on a general course of dealing rather than on any specific act or occurrence. Just precisely when this change took place, I think it is impossible to say. It is sufficient that it took place, in my opinion, before the contracts now sued on were entered into.

In reaching this conclusion, I do not for a moment differ from the learned trial Judge in his estimate of the evidence given by the witnesses. The only point in which I differ is the proper inference to be drawn from the admitted facts, and from the correspondence and documents which are in evidence. While Barry was away, throughout July and August, he was giving almost no attention to this business, leaving it entirely in the hands of Durocher, and carrying it on to an extent greatly in excess of the specific and narrow limits of \$20,000 originally proposed; and, I think, the result was that, so far as the public was concerned, and so far as these plaintiffs were concerned, Durocher was in fact authorised to conduct this particular trade or business, to act generally for Barry in connection with it, and that he had implied authority to do whatever was incidental to the ordinary conduct thereof. It seems to me that the contract here in question was within the ordinary scope of the business so intrusted to Durocher.

I prefer to put it upon that ground rather than on the ground of "holding out," because I doubt whether there was any actual holding out to these plaintiffs of such a character as to make a basis for the liability here claimed; but I do think that, Durocher

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being a general agent and representative of Barry, the plaintiffs were entitled to deal with him on that basis, and were not put upon inquiry as to the extent of his authority. His authority, in fact, as between him and Barry, was such that he had, according to his instructions, no right to buy these "futures" on credit; but that was a circumstance into which it was not the duty of the plaintiffs to inquire; and, Durocher being a general agent, the plaintiffs were entitled to assume that he had full authority to do what was done.

With respect to the question of commission paid by Millman to Durocher, I have felt great difficulty, but I have reached the conclusion that the truth is that the splitting of commission with Durocher by Millman was not, under the circumstances here shewn, done with the view of influencing Durocher to purchase more canned goods or to pay an enhanced price.

I think Durocher expected to gain personally to a large extent by carrying through the transaction in a profitable manner.

His interest was immeasurably greatest in the direction of doing the best he could for Barry, and the commission receivable from Millman was not such, I think, either in amount or in the way in which it was received, as to be a bribe: *Rowland v. Chapman*, 17 Times L.R. 669.

While I do not think that Barry ever had actual knowledge that Durocher was getting a commission, the manner in which the correspondence regarding the commission passed indicates that no effort was made to conceal it from him.

I am quite unable to adopt the view that there was anything in the nature of a conspiracy to defraud, between Barry and Durocher. In the circumstances, Barry finds himself in the unfortunate position of being liable for the loss in question without any impropriety on his part.

I think the appeal must be allowed.

RIDDELL, J., agreed in the result.

Appeal allowed.

[APPELLATE DIVISION.]

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Feb. 19.
April 14.AUGUSTINE AUTOMATIC ROTARY ENGINE CO. v. SATURDAY NIGHT
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Libel—Company—Pleading—"Fair Comment"—Discovery — Examination of Officer of Plaintiff Company—Relevancy of Questions—Financial Condition of Company—Order of Judge in Chambers—Discretion—Appeal—Questions of no Practical Consequence—Leave to Appeal—Rule 507.

The plaintiffs, an incorporated company, sued the defendants, also an incorporated company, the publishers of a newspaper, for libel in having said of the plaintiffs in print, in substance, that their stock was worthless because the rotary engine which they were formed to make and sell was of no value. An officer of the plaintiff company, being examined for discovery by the defendants, refused to answer certain questions put to him. The defendants did not plead justification, but "fair comment." Some of the questions put to the officer related to his personal acts, and others to matters affecting the plaintiff company, their finances, prospectus, business dealings, etc.:—

Held, that an order of *BOYD, C.*, in Chambers, requiring the officer to answer the questions, should be affirmed with a trifling variation.

Per MEREDITH, C.J.C.P.:—The officer was well within his right in refusing to answer the questions, which were irrelevant to the issues actually raised; but the order should not be interfered with because no appeal should be brought before the Appellate Division in such a case as this—whether the officer did or did not answer the questions was a matter of no substantial consequence.

Peck v. Ray, [1894] 3 Ch. 282, applied.

Per RIDDELL, J.:—Under the plea of "fair comment," a defendant is bound to prove the truth of the facts upon which he has commented. In this case, upon the pleadings, the defendants had to meet the charge that the words employed had the special meaning alleged in the innuendoes, and the charge that the words were actionable in themselves; in defence, they had to prove all the alleged facts, and prove that their comment was fair. These being the issues, the questions were relevant, and should be answered, with some few and trifling exceptions.

Per MASTEN, J.:—Questions should be answered whenever they relate to a matter in issue. Leave to appeal from the order of the Chancellor (the order being made in the exercise of his discretion) should not have been granted under Rule 507.

APPEAL by the defendants from an order of the Master in Chambers dismissing an application made by them to compel better discovery by the president of the plaintiff company upon *vivâ voce* examination therefor, by answering certain questions which he refused to answer.

The action was for libel. The defendants were the publishers of a newspaper, and the alleged libel was in an article in the newspaper, in which it was said, in substance, that the stock of the plaintiffs, an incorporated company, was worthless because the rotary engine which they were to make and sell was of no value.

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February 18. The appeal was heard by BOYD, C., in Chambers.

G. M. Clark, for the defendants.

W. J. Elliott, for the plaintiffs.

February 19. BOYD, C.:—Question 61 has reference to the stock of the Augustine Automatic Rotary Engine Company (the plaintiffs), and does not appear relevant in this case.

Questions 142 and 146 should be answered, as to the dealings of the president with his Buffalo stock.

Questions 306 and 308 need not be answered.

Questions 547-551 should not be answered.

Questions 640-647 should be answered.

Questions 730, 738, 739, and 740 should be answered.

Questions 748, 752, 753, 754, 762. These relate to damages: as no special damages are claimed, they cannot be asked in this form, but I follow the course indicated in *Blachford v. Green* (1892), 14 P.R. 424: if the plaintiffs claim diminution of profits, particulars should be given and the examination continued on that line; but, if no such claim, there should be no discovery as to general damage.

Questions 787, 789, 790 should be answered.

Question 798 should be answered.

Questions 849, 862, 865, 867 should be answered.

Questions 872, 873, 874 should be answered.

Question 897 need not be answered.

Questions 910 and 912 should be answered.

This disposes of all the questions.

Costs of the application and appeal will be costs in the cause.

The questions referred to in the Chancellor's judgment (none of which were answered) and some other questions and answers, explanatory of those referred to, are as follows:—

142. Then how many of your own shares did you market?

146. Then how many shares did you sell while you were advertising in Canada, how many of your own personal shares of the Buffalo company did you market?

306. Where was the first place that you went to? Was it Lindsay? Or where did you go before you went to Lindsay?

308. Did you propose establishing any business in Lindsay?

547. Do you remember this statement in the Toronto "Saturday Night" of the 25th November—"Thousands of rotary engines have been devised, and all so far have failed?"

548. Do you remember in that article of the 25th November in "Saturday Night" where several questions were asked? A. I would have to see the paper to know the issue.

549. You remember in one issue there were several questions? A. I remember in one issue there are several jokes.

550. One was, I am advised, "Is the Buffalo company paying dividends? If so, have the dividends been earned?"

551. Is that one of the jokes to which you refer?

640. That is a point in issue. Look at your books and see—produce your books?

641. What is the objection? You have already told me you have been accused in this case throughout of using this as a stock-jobbing proposition, instead of a manufacturing business. How much stock have you sold, I ask you now, in the Canadian company?

644. I ask how much stock the Canadian company sold prior to the 21st January, 1912, when he states that they did not have sufficient money to import an engine—will the books of the company shew? A. Certainly.

645. Who has these books? A. I have them.

646. Will you produce these books to me to shew the sales of stock in the Canadian company and the amount of money received?

647. Will you produce the stock-book of the company shewing the number of shares of stock of the Canadian company sold, and the books of the company which will shew the amount of cash received, and when received, for the sale of this stock?

730. How many shares of stock have been sold by the Canadian company?

738. Do you object to giving us a statement of the finances of the Canadian company?

739. You do object to giving us——

740. Will you give us a statement of your dealings and where the money went that went into the Augustine company?

748. Then tell me the names of the men who had subscribed for stock and partly paid and then stopped?

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752. You refuse to give me the names of these men—have you got them?

753. Are they still owing to the company?

754. Has any action been taken to collect upon this stock?

762. Can you give me the names of the parties to whom these engines were sold in Toronto?

787. Will you look at that book, that prospectus, and tell me is that a copy of the prospectus issued by the Canadian company, the plaintiffs in this action?

789. Then, probably, if I were to read you some extracts from this you might be able to say whether or not; I see the first is, "Its Unlimited Field"—

790. I see the first under the heading here of "Its Unlimited Field"—"We confidently assert that in ten years from now no other engine will be found in use where economy is desired." Was that in the prospectus of the plaintiff company in this action?

798. Then, is the statement contained in this true?

849. Will you look at this document and tell me whose photograph that is?

862. I see here on the back page a photograph of Thomas W. Brown. Is that Mr. Brown?

865. Would you look at that picture and tell me is that the gentleman?

867. Who printed this document?

872. Then I see in this exhibit 3, which has been marked for identification, a picture of Thomas W. Brown as first assistant to the president of the Augustine Automatic Rotary Engine Company. Is that the Thomas Brown that was at St. Thomas.

873. There is no doubt that this is your photograph both on the front page and on the back of the cover?

874. And this exhibit, I see, refers entirely to the Augustine Automatic Rotary Gas Engine?

897. I tell you what the St. Thomas newspaper said it was—"Mr. Brown then gave a chalk talk shewing the investment." Tell me, if this is true, what Mr. Brown did in your presence? "Mr. Brown then gave a chalk talk shewing the investment feature of the parent company and its enormous earning power. Mr. Brown is now located in his office at 607 Talbot street, and

said he would be glad to see all who were interested." Is that correct—he gave a chalk talk shewing the investment feature of the parent company in its enormous earning power?

909. And two propositions were submitted in writing? A. Not from us.

910. Who from?

911. There were propositions submitted? A. Not from the company.

912. Well, who were they from?

On the 14th March; 1916, an order was made by FALCONBRIDGE, C.J.K.B., in Chambers, allowing the plaintiffs to appeal to a Divisional Court of the Appellate Division from the order of the Chancellor; and the plaintiffs entered an appeal accordingly.

March 27. The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and MASTEN, JJ.

I. F. Hellmuth, K.C., and *W. J. Elliott*, for the appellants, argued that the plaintiffs' president had rightfully refused to answer the questions which he had been directed to answer. The defendants had not pleaded the truth of the alleged facts to which these questions referred, and so had no right to attempt to prove them. Many of the questions referred to what the president had done with his own stock. The defendants were limited, in their right to discovery, to the facts set out in their particulars: *Peter Walker & Son Limited v. Hodgson*, [1909] 1 K.B. 239; *Arnold & Butler v. Bottomley*, [1908] 2 K.B. 151, at p. 159. The defendants' plea was fair comment, which did not justify them examining as to the truth of facts, when they had not pleaded truth: *Hindlip (Lord) v. Mudford* (1890), 6 Times L.R. 367; *McKergow v. Comstock* (1906), 11 O.L.R. 637; *Yorkshire Provident Life Assurance Co. v. Gilbert & Rivington*, [1895] 2 Q.B. 148.

G. M. Clark, for the defendants, respondents, contended that the questions were all proper and should be answered. The plaintiffs complained of the whole article, saying that, when the defendants libelled their president, the plaintiffs themselves were thus libelled. This stand gave the defendants, he submitted, the

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right to ask the questions objected to. He referred to Odgers on Libel and Slander, 5th ed., p. 216.

Hellmuth, in reply.

April 14. MEREDITH, C.J.C.P.:—The plaintiffs are an incorporated company, and, in this action, have sued the defendants for libel in having said of them in print, in substance: that their stock is worthless because the rotary engine which they were formed to make and sell is of no value.

The alleged libel was contained in a long article published in the defendants' weekly newspaper, an article mainly commenting upon the plaintiffs' president personally, in an extremely severe manner; and asserting that the formation of the plaintiff company was only part of a fraudulent scheme on his part to make money by false pretences regarding the engine, of which he is the patentee; and a confusion of the attack upon him with that which was said regarding the plaintiffs has led to an interminable examination of him, for discovery in this action, out of which examination the points involved in this appeal have been made, and much discussion has ensued, most of which might have been spared if the difference between the defendants and their president, and between what was said of him and what was said of them, had been borne in mind.

The appeal is from an order requiring the plaintiffs' president, who is individually in no way a party to the action, to attend again for examination for discovery and to answer 25 questions which, on the advice of the plaintiffs' solicitor, he did not answer on his former examination—25 questions out of the 960 then asked, all of which were answered except the 25.

The first two of these 25 questions relate to the number of shares of the witness in another company, formed for the same purpose as the plaintiff company, but in no way connected with it, sold by the witness; questions, plainly I should have thought, irrelevant to the real questions involved in this action.

The next three were aimed at shewing that the witness had said that which was untrue when, in his testimony, he stated that one of the engines in question had not been brought to Toronto, from Buffalo, to be tested at the School of Practical Science, because he had not the means to bring it. But how

could that be evidence against the plaintiffs? Whether the engine is really only a "toy engine" or not is not to be determined on the witness's veracity or want of veracity, or confidence or want of confidence in any particular test: if he were the plaintiff in this action, it would be different.

The remaining questions all relate to matters affecting the plaintiff company, their finances, their prospectus, and some dealings with the City of St. Thomas with a view to obtaining a bonus for the establishment of a factory there, things which are not relevant to the substantial questions in issue between the parties to this action. This seems to me to be the more abundantly plain because, although in the newspaper which contained the alleged libel in respect of which this action is brought, the plaintiff company are attacked in statements of fact such as: that their stock is "almost worthless," that it is "worthless paper," and that the "whole flotation scheme is a yellow calcium glare;" the defendants have not attempted to plead the truth of any of these things, or of anything else aimed at the financial standing of the plaintiff company. To contend that the defendants may attempt to prove any of these things without pleading the truth of them, I should have thought a waste of words. Equally so, indeed more so, if more so be possible, to contend that because the plaintiffs have, unnecessarily and inconveniently, set out in their statement of claim the whole article, instead of the parts relating to them, they are therefore alleging that everything said in it is libellous of them.

I am therefore of opinion that the witness was quite within his right in refusing to answer all of these 25 questions; but I am quite as clearly of opinion that this appeal should be dismissed, on a very different and much more important ground; and I have expressed my views upon the question of the relevancy of the questions, only because I am not in agreement with all of the other members of the Court upon that question, and desire, as far as is possible, to prevent the hands of the trial Judge being tied on any question of admissibility or inadmissibility of evidence, at the trial.

The ground upon which I hold that this appeal should be dismissed, is: that appeals to this Court on matters of practically no consequence should not be brought, that they should be dis-

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couraged and stopped. Whether the witness did or did not answer these questions was and is a matter of no substantial consequence; he had answered scores of questions quite as irrelevant; and, if he had answered these, they would have remained, like the others, unused and for all substantial purposes useless. The value and the purpose of these examinations is, I fear, seldom kept in mind; often the object of the examiner seems to be only to keep on asking questions; no aim; no definite object. And in this case there was less excuse for waste of words than usual, because no part of the evidence could be used upon the trial. Anything that tends to save time and costs of the trial, and everything that tends to prevent surprise and consequent disadvantage at the trial, may well be thoroughly gone into; but it must always be remembered that the examination is not part of a trial; that it is for the purpose of discovery; and that it should be kept to the point and within reasonable bounds.

This appeal, causing considerable delay and involving a very considerable sum of money in costs, for no substantial purpose, seems to me to be unwarrantable; indeed it is difficult to imagine any case of the kind in which an appeal to this Court is really likely to be needed in the interests of justice, or in any substantial interests of the parties. No principle is involved; there are but 25 questions out of nearly the inexcusable number of a thousand; and those 25 questions, answered or unanswered, cannot really make a jackstraw's difference to either party, at the trial.

Although the cases are not quite alike, because in this case the question is, whether the questions should or should not be answered, and in the other, to which I am about to refer, the question was, whether or not the questions should be asked, the principle involved is much the same; so I wish to quote, for the benefit of all concerned in such appeals as this, the words of one of the Lords Justices who dismissed the appeal in the case of *Peek v. Ray*, [1894] 3 Ch. 282, 288: "I say, speaking for myself, most emphatically, that where a Judge has, under these new Rules, had interrogatories brought before him, and has determined whether he will allow them or not, or which of them he will allow, or what part of them he will allow, if any one chooses to appeal from that allowance, I hope he will never be allowed

to succeed unless he can shew some serious question of principle in which the Judge, in the leave he has given, has made a material error. To say that this Court is to look through the interrogatories which the learned Judge of first instance has allowed, and to see whether this, that, or the other part of an interrogatory has been properly allowed or not, is to my mind a total mistake as to the functions of the Court of Appeal. The allowance of interrogatories is a matter very largely in the discretion of the learned Judge before whom the interrogatories are brought, and from such discretion the rule is that although an appeal may be brought, no appeal shall be allowed to succeed unless it shall be shewn that in the exercise of that discretion a material mistake has been made. . . . I confess that I think this kind of appeal should be discouraged in every way possible" (p. 290). Another of the Lords Justices used these equally firm words (p. 286): "I protest altogether against settling interrogatories. I admit the right to appeal, and it is our duty to entertain the appeal and say whether there is any substantial injustice done by the order appealed from." And the third, these (p. 287): "I think no appeal ought to be brought, and no appeal I am certain will be allowed by this Court in a case like this, unless there is some error on a question of principle involved, or some substantial injustice has been done."

It should be laid down now, in equally unmistakable words, that no appeal such as that in question should be brought unless something really substantial depends upon the points involved in it. There is nothing of that sort in this appeal; indeed it, and all the long delay in bringing this case down to trial, a delay filled up with at most not very important interlocutory applications, carried, whenever the opportunity could be grasped, to this Court, seems to have been prompted more by excessive resentful personal feelings than any desire to get to a just end of this litigation. It may be that those concerned in this case think it a matter of transcendent importance, whether the one or the other solicitor was the more correct in his contentions as to the admissibility of answers to the few questions involved, but I do not, and that really is the "most important" question involved in this appeal, for all present substantial purposes.

My firm opinion regarding the case is therefore this: that,

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unless the parties now get to trial promptly, they had better get out of Court altogether.

I would, for these reasons, dismiss the appeal.

My brother Masten has found some difficulty in considering the case because we have not been furnished with the reasons of the learned Chief Justice for giving leave to appeal, and I add these few words merely to point out that, if the solicitors have been remiss in that respect, they have been at least quite impartially remiss, for neither have they furnished us with the reasons of the learned Chancellor for ordering the witness to attend again for examination and to answer all of these 25 questions.

RIDDELL, J.:—This is an appeal by the plaintiff company from an order of the Chancellor directing their manager to answer certain questions put to him on his examination for discovery as an officer of the company, leave having been given to appeal by the Chief Justice of the King's Bench.

The plaintiffs are a company exploiting a certain "new and improved" engine: the defendants, a company publishing in Toronto a weekly periodical, "Saturday Night," so called from being issued on Thursday.

The plaintiffs brought an action of libel, claiming that the defendants "falsely and maliciously printed and published of the plaintiffs and of and concerning their business and mode of conducting the same the words following, that is to say" (here follow six foolscap pages of closely typed writing).

Then, without particularising, innuendoes are added: "meaning thereby that the engine, the manufacture and sale of which is the plaintiffs' business, was not what it was represented to be; that it was not a *bonâ fide* engine, but was a mere toy or plaything, and that the plaintiffs' enterprise of building and selling the said engine was nothing but a fraudulent device and was being used by the plaintiffs for fraudulent purposes; that the plaintiffs were about to defraud the Corporation of the Town of Chatham in connection with a . . . contract . . . ; that the capital stock of the plaintiffs was worthless, or all but worthless; and that the flotation or business of the plaintiffs was a wholly fraudulent business, and was being carried on for

the purpose of defrauding the public and any one who would buy shares of the plaintiffs' capital stock."

To this, the defendants plead: (1) did not publish; (2) words not defamatory; (3) "if they did publish, etc., the said words, in so far as they consist of allegations of fact, are true in substance and in fact, and, in so far as they consist of expressions of opinion, they are fair and *bonâ fide* comments made in good faith and without malice upon the said facts, which are matters of public interest, and the publication of the same was for the public benefit."

This is one of the defences which mean that the defendant had the right to say of the plaintiff what he did. Where a defendant conceives he is right, he may: (a) "justify," i.e., plead that all he said was true; or (b) say, "What I said of you was of two classes, facts and comments—I had the right to say the former because the facts alleged are true, the latter because the comments are fair." Either method of pleading is a justification, but it is only the former that receives the name in our technical terminology, the latter is technically called the plea of "fair comment."

But, under either plea, the defendant is bound to prove the truth of the facts.

However unsatisfactory the nomenclature may be or the practice—see *per* Vaughan Williams, L.J., in *Peter Walker & Son Limited v. Hodgson*, [1909] 1 K.B. 239, at p. 247—it is well established.

The plaintiff, by the pleading of fair comment being put on notice that the defendant undertakes to prove the truth of some facts, naturally desires to know what these are, and accordingly he demands particulars.

In the present case particulars were ordered and furnished.

When we remember that a charge with an innuendo is in our practice equivalent to two charges, one without and one with the innuendo: *Watkin v. Hall* (1868), L.R. 3 Q.B. 396, 402; and that, while the plaintiff cannot throw overboard his innuendo and adopt a new one, he may rely upon the natural and primary sense of the words themselves: *Hunter v. Sharpe* (1866), 4 F. & F. 983; *Simmons v. Mitchell* (1880), 6 App. Cas. 156; *Ruel v. Tatnell* (1880), 29 W.R. 172; *Fisher v. Nation Newspaper Co.*,

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[1901] 2 I.R. 465; we see what burden is cast upon the defendant—he has to meet (after publication proved): (1) the charge that the words employed have the special meaning alleged in the innuendo—he may if he is so advised give evidence as to this: Folkard, 7th ed., p. 498; (2) the charge that the words are actionable in themselves. So much for the statement of claim and the matters contained therein which the defendant has to consider.

Then, in the defence, he must (3) prove to be true all the alleged facts, and (4) that his comment is fair, always bearing in mind that an allegation of fact is not comment, and, however thoroughly believed by the defendant and honestly stated, it must be proved to be true.

With these issues in mind, it seems to me that this appeal cannot succeed except in some minor and unimportant matters.

It will be necessary to take up the various questions which were objected to and directed by the Chancellor to be answered:—

Questions 142, 143, 146. The plaintiffs allege that all that was contained in the article was a libel on them—not on their manager. One of the statements in the article is: “Augustine . . . is peddling almost worthless stock to persons in Canada. . . . He sells stock instead of selling engines. . . .” The particulars of fact contain this: “Augustine . . . was . . . endeavouring to sell stock in the Augustine Automatic Rotary Engine Company of Canada . . . of which he was promoter.” These questions relate to the sale of stock in a Buffalo company, and I cannot see how they come within the particulars—the defendants do not undertake to prove that Augustine is selling “stock instead of engines,” but only that Simon said so: particulars (c), (d). I think these need not be answered.

Questions 640, 641, 644, 646, 647. The witness was being asked about the sale of stock of the Canadian company—the allegation that he was doing so is complained of by the plaintiffs as a libel upon them; the defendants undertake to prove the truth of the allegation. Moreover, the defendants claim as fair comment: “Augustine . . . proceeds to scatter his worthless paper through Ontario and Quebec;” and also, “His whole flotation scheme is a yellow calcium glare,” etc., etc. I see no reason why these questions should not be answered.

Question 730 is covered by the same principle—the manager was selling for the company.

Questions 738, 739. An objection is made to giving the financial status of the company. The article charged that the stock was almost worthless, but the defendants do not undertake to prove that as a fact; had they done so, I think these questions should have been answered. The defendants do plead comment “in good faith and without malice;” and the truth or falsity of the statement that the stock was almost worthless might go toward shewing the good faith and absence of malice: *McKergow v. Comstock*, 11 O.L.R. 637; *Jenoure v. Delmege*, [1891] A.C. 73. See also *Watt v. Watt*, [1905] A.C. 115, at p. 118. The questions should be answered.

Question 740 is too broad and need not be answered in that form.

Questions 787-790 are not quite intelligible. What purports to be a prospectus of the plaintiff company is produced: the witness is asked if that is a copy of the prospectus issued by the company, but is not allowed to answer—why, does not appear. Finally, counsel for the plaintiffs takes the position that the witness must not answer any question “as regards the contents of the prospectus.” As regards exhibit 1, the alleged copy not being put in before us, we have no means of knowing its contents. I think that here we cannot interfere with the order of the Chancellor. We have more than once spoken of the omission to put in documents that are considered material.

Question 798. The witness was asked “to look at that document . . . and tell . . . is that a document . . . got out by the plaintiff company;” he thought it was. Question 798: “Then is the statement contained in this true?” The witness declined to answer—why, we do not know, nor what the statement was. Without some information, we cannot interfere with the Chancellor’s order.

Question 849 is equally unintelligible, with the same result.

Questions 862, 865. The witness employed a man by the name of Thomas W. Brown to sell stock—he refused to say whether a photograph produced was of this Mr. Brown, although he expressed his ability to identify. It is to be presumed that the defendants intend to shew something of the sales through

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Brown, the plaintiffs' agent, employed by the plaintiffs' manager—and desire to know whether the Brown that sold is the Brown employed. I can see no objection to the questions.

Question 867 is immaterial in the present form, but the witness could be asked if the plaintiffs caused the document to be printed.

Question 872 is covered by what is said as to questions 862, 865.

Question 873 can only go to shew that the witness is manager of the plaintiff company, and that elsewhere appears—it is only repetition, but there can be no reason for refusing to answer.

Question 874 may or may not be of importance: we have not the exhibit—it may be quite proper to ask the question, or it may be that the question is an endeavour to have the witness interpret a written document—we cannot tell. We should not interfere with the order below.

Questions 910-912. Certain propositions were submitted to the industrial committee at St. Thomas, but the witness swears that they were not submitted by the plaintiffs. Nothing more appearing, I cannot see why he should be compelled to state from whom they were submitted. It might be, at some other stage and after other evidence, that such questions were proper, but not here and now.

With the few and trifling exceptions noted, I think the appeal should be dismissed with costs.

LENNOX, J.:—I agree.

MASTEN, J.:—This is an appeal from an order of the Chancellor, reversing in part an order of the Master in Chambers and directing that Augustine, the president of the plaintiff company, do attend for examination for discovery and do answer certain questions, particulars of which are set forth in the notice of motion, he having previously refused to answer such questions.

The action is an action for libel, and arises out of a somewhat lengthy article alleged to have been published by the defendants concerning the plaintiffs and concerning D. F. Augustine, president of the plaintiff company, and particularly concerning the rotary engine manufactured by the plaintiff company.

In this case, speaking for myself, I would have been glad to

have had before the Court a statement of the reasons upon which an appeal was permitted to this Court. By Rule 507 it must appear to the Judge permitting such an appeal that there is good reason to doubt the correctness of the judgment or order from which the applicant seeks leave to appeal, and that the appeal involves matters of such importance that in the opinion of the Judge leave to appeal should be given.

A perusal of the material filed on this appeal leads me to the conclusion that the questions to which answers have been refused relate to issues in this action. If I am right in that view, the questions should be answered.

Confusion, difficulty, and expense will be unending if in every case the opinion of a court of appeal has to be taken as to whether, as a matter of discretion, questions should or should not be answered. The only solution under our present practice seems to be to require questions to be answered whenever they relate to a matter in issue.

Of the practical value of this discovery one may have grave doubts. It may prove a valuable education to the plaintiffs, but such matters are for the determination of counsel in the action and not of the Court. The only principle that can be applied is such as I have indicated above.

It may be suggested that such proceedings tend unwarrantably to delay the trial of the action; but, if such delay occurs, it is always in the power of the party desiring to bring the case on for hearing, to set it down and force it to trial, and on any motion to postpone on the ground that discovery has not been completed very different considerations from those which govern the present motion will be applicable. Personally I would have dealt with the matter simply by dismissing the appeal, but my brother Riddell has gone seriatim through the questions to which answers were refused, and I concur in his conclusions, only protesting again that I do not apprehend on what grounds the leave to come to this Court was granted.

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Appeal dismissed with costs.

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[APPELLATE DIVISION.]

April 14.

ORMSBY V. TOWNSHIP OF MULMUR.

Municipal Corporations—Action against Township Corporation for Injury to Land—Deposit of Sand from Highway—Nonrepair of Highway—Necessity for Notice under Municipal Act, sec. 460—Amendment at Trial.

Water ran from a highway upon the plaintiff's land, but did no harm until the defendants, a township corporation, in repairing the highway, diverted the course of the water so that it ran through and gathered up sand and deposited it upon the plaintiff's land, to his injury:—

Held, that the plaintiff's action for damages for that injury was not one for damages caused by the neglect of the defendants to keep the highway in repair; and that he had a good cause of action, which was not barred by failure to give the notice required by sec. 460 of the Municipal Act, R.S.O. 1914, ch. 192.

Strang v. Township of Arran (1913), 28 O.L.R. 106, considered and distinguished.

Seemle, per RIDDELL, J., that the defendants were properly allowed to amend at the trial by setting up the want of notice.

Judgment of the County Court of the County of Dufferin reversed.

APPEAL by the plaintiff from the judgment of the Judge of the County Court of the County of Dufferin dismissing an action brought in that Court to recover \$300 for injury to the plaintiff's land by sand brought thereon by water, the cause of which was said to be the weakening of an embankment, and unskilful and negligent work on a highway, done by the defendants, the township corporation.

The action was tried with a jury; at the close of the plaintiff's case, the defendants moved for a nonsuit; upon that motion the County Court Judge reserved judgment; the case went to the jury, who found a verdict for the plaintiff with \$125 damages; the motion was renewed after the verdict, and the learned Judge granted it, and pronounced the judgment now appealed against, holding that the plaintiff had no right of action except under sec. 460 of the Municipal Act, R.S.O. 1914, ch. 192, and that the requirements of that section as to notice were not observed by the plaintiff.

March 27. The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and MASTEN, JJ.

W. E. Raney, K.C., for the appellant, argued that the learned trial Judge should not have allowed an amendment setting up want of notice. The damage here had nothing to do with the want of repair of the highway. The damage was apart from any

repair or nonrepair. The action was not limited by the provisions of the Municipal Act, R.S.O. 1914, ch. 192, sec. 460. That section relates exclusively to highways. When the sand got on the plaintiff's land, a cause of action arose apart from the statute. The case of *Strang v. Township of Arran* (1913), 28 O.L.R. 106, does not apply, because there the damage arose from injury to the plaintiffs' land occasioned by deprivation of access over the highway. Here the injury arose from something done off the highway.

C. R. McKeown, K.C., for the defendants, respondents, contended that the judgment appealed from should be affirmed. Section 460 of the Municipal Act was applicable. The action was really for damages caused by the neglect of the defendants to keep the highway in repair, and no notice of the action was given. He referred to *Brown v. City of Toronto* (1910), 21 O.L.R. 230; *Strang v. Township of Arran*, 28 O.L.R. 106.

Raney, in reply.

April 14. MEREDITH, C.J.C.P.—The plaintiff's action was brought to recover damages for the flooding of his land by the defendants; not flooding it with water, for he admits that the natural and proper outflow of the water is over his land, but for flooding it with sand—not that alluvium which has an enriching effect, but sand of a nature which has a deleterious effect; and it must now be taken as settled that his claim was a just one, because a jury, who ought to know a good deal about such things, have given a verdict in his favour and have assessed his damages at \$125. But, notwithstanding the verdict, the trial Judge has, after taking time for consideration, directed that the action be dismissed; and this appeal is brought against that judgment and seeking a judgment giving effect to the verdict.

The grounds upon which the judgment in appeal was based were: that the action was really one for damages caused by the neglect of the defendants to keep a highway vested in them in repair, and that no notice of the action had been given; in other words, that the plaintiff had no right of action, except under the 460th section of the Municipal Act, which provides that no such action shall be brought unless notice of the claim and injury complained of has been given within thirty days after the happening of the injury—and no such notice was given.

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The only ground for holding that the action was one based upon such neglect is, that the sand which was deposited on the plaintiff's land came from a cutting made by the defendants in the highway for the purpose of more effectually draining it: but how can that circumstance make the claim one for neglect of the statute-imposed duty of the defendants to keep the road in repair? It is quite immaterial to the plaintiff, so far as the matters in question in this action are concerned, what state of repair the road may have been in, or where the sand came from, or in what manner lodged upon his land, or whether the cutting was repair or neglect to repair: all he is concerned with is that the defendants brought it there, to his injury, which they had no right to do, and so are answerable to him for the loss he has sustained by that unlawful invasion of his property-rights.

The trial Judge seems to have relied upon the case of *Strang v. Township of Arran*, 28 O.L.R. 106, for the conclusion reached by him, and it may be that the wide view taken in that case of the section of the Municipal Act to which I have referred, afforded encouragement to him in the conclusion which he eventually reached; but it is obviously no authority for that conclusion, having been an action brought expressly under the provisions of that section of the Act and supported upon it only. The most substantial and primary question in that action was, I should have thought, whether the plaintiffs individually had any cause of action, whether their true remedy was not by way of indictment—a question very little, if at all, discussed in it. If there be such a private right of action, there are many municipalities in which such actions might be brought on in legions; and it would be rather anomalous for those whose indirect duty it was to repair, or pay for the repair of, the highways, to be entitled to damages for a breach of such duty, and so be paying indirectly the damages and costs recovered by the numerous litigants. If such a practice became general, the remedy would of course lie in something in the nature of a “reversion to type” in the shape of repair of highways by means of frontage obligation and taxation; which would not be a novelty nor going so directly back to original methods as is done and seen throughout the winter in the clearing of the snow from the sidewalks of the highways by the occupiers of the land abutting upon them. My own idea would have been

that the duty to repair highways was not imposed for the benefit of the land-owner, rather that the duty to repair still rests upon the land-owner, though indirectly through the municipal corporation, the council of which is chosen by the ratepayers, from whom the money for all municipal purposes, including road repairs, is obtained by taxation, and that the duty to repair is imposed for the benefit of those lawfully using the highway, generally, but perhaps hardly accurately, described as "all His Majesty's liege subjects," and that they only would have a right of action for injury sustained through nonrepair; and, if this be so, it would be the more abundantly plain that the plaintiff should retain his verdict.

The appeal must be allowed, and effect must be given, in the County Court, to the verdict of the jury.

RIDDELL, J.:—The plaintiff is the owner of land in the township of Mulmur, lying west of a certain highway. For many years the water running down south on the east side of that road crossed it by a culvert, and for some time at least, the culvert being stopped up, over the culvert and upon the plaintiff's land. This did little or no damage to him; but in course of time the road at this point was cut into by the water, and it became necessary for the township corporation to repair it. In 1912, their servant did repair the road, but cut through a bank of hard material on the east side of the road, just south of the culvert, and thereby allowed the water which formerly crossed the road to run further south on the east side of the road through a sandy place or more than one sandy place, gathering sand in its course; then to cross the road at a point further south, carrying with it the sand and depositing it on the plaintiff's land, to his detriment.

The plaintiff sued; at the trial, the defendants desired to set up the statute, R.S.O. 1914, ch. 192, sec. 460, as no notice had been given—and, after the jury had found a verdict for the plaintiff, the defendants were allowed to plead the statute, on terms of paying the plaintiff's costs. Effect was given to the defendants' contention, and the learned County Court Judge Fisher, of the County Court of the County of Dufferin, dismissed the action—the defendants to pay the plaintiff's costs.

The plaintiff now appeals.

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The first objection is, that the trial Judge should not have allowed the amendment setting up want of notice. I think that the course taken was wholly unexceptionable. It is true that, in a case in which the amendment was not asked for until all the evidence was in, the Chancellor refused an amendment to set up the statute: *Longbottom v. City of Toronto* (1896), 27 O.R. 198; but, in a not dissimilar case, a statute was allowed to be pleaded: *Williams v. Leonard* (1895-6), 16 P.R. 544, 17 P.R. 73, 26 S.C.R. 406. Such defences as this, based upon the provisions of a statute, however distasteful they may be to some—and I have often heard a very learned Chief Justice inveigh against the defence of the Statutes of Limitations—are defences “on the merits,” and must be given full effect to. And our Courts are not becoming more technical, but the reverse, in allowing matters of fact to be proved, and the law based upon the facts of the case made effective, whatever mistakes the lawyers may have made in putting their cases on paper.

But I do not think that the statute requires notice in the present case.

The case of *Strang v. Township of Arran*, 28 O.L.R. 106, was cited as deciding that the section refers not simply “to damages to the person or to damages arising from some accident, but includes any cause of action resulting from the municipality’s default:” see p. 112. Then it is said that the *ratio decidendi* in that case was, that the statute required notice only in the case of “accident,” and that the change in the statute to the word “injury” will take the present out of *Strang v. Township of Arran* on this point. I do not think it necessary to decide whether the dictum already cited from p. 112 correctly sets forth the law—as at present advised, I am not prepared to assent to that statement of the law.

But here the damage had nothing to do with the want of repair of the highway—it is true that, in the course of repairing, the defendants acted negligently, but that does not make the resultant damage due to nonrepair, any more than if, in blasting on the highway to repair it, a negligent blast sent a rock upon the plaintiff’s land. The injury is wholly independent of any state of repair or of nonrepair of the road—it might have happened had the road been the finest macadam or asphalt, and a model to all municipalities.

That an action lies is shewn by *Smith v. Township of Eldon* (1907), 9 O.W.R. 963, and the cases cited.

I think that this ground of defence must fail.

There is ample evidence upon which the jury could have found as they did.

I would allow the appeal and direct judgment to be entered for the plaintiff for \$125 (the amount found by the jury) with costs; the appellant to have the costs of this appeal.

LENNOX, J.:—I agree in the conclusion reached by the other members of the Court, but in doing so prefer to put my judgment upon the ground that the right of the plaintiff to recover damages is not limited, in the way set up by the defence, by the provisions of sec. 460 of the Municipal Act, R.S.O. 1914, ch. 192, and I do not understand *Strang v. Township of Arran*, 28 O.L.R. 106, to be a decision to the contrary.

MASTEN, J.:—This is an appeal from a judgment of the County Court Judge of the County of Dufferin. The action is brought to recover damages for injuries done to the plaintiff's land through the deposit thereon of sand and detritus brought there by water. The allegation is that the defendants have interfered with the natural flow of the surface water, and that such interference has resulted in the deposit on the plaintiff's land of the sand, and the consequent injury.

At the close of the plaintiff's case, the defendants moved for a nonsuit, on which judgment was reserved, and the case then went to the jury, who found in favour of the plaintiff, with damages assessed at \$125.

The learned County Court Judge has directed a judgment giving to the defendants leave to amend their defence by pleading the provisions of sec. 460 of the Municipal Act (that the plaintiff's right of action is barred by failure to give notice), and directing that upon such amendment being made the action should be dismissed, the defendants to pay all costs.

The question that arises is, whether, upon the facts shewn, the case comes within sec. 460 of the Municipal Act.

I am of opinion that it does not. Section 460 relates exclusively to highways. So long as the water and sand which injured

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the plaintiff's land remained on the highway, no cause of action accrued to him. The defendants were entitled to deal with their highway and manage it in any way they chose, but at their own risk they interfered with the watercourse in such a way as to discharge water and sand on the plaintiff's land. It was only when the water and sand left the highway and came upon the plaintiff's land as a result of the action of the defendants themselves that a cause of action arose. For such a cause of action and for such an injury the plaintiff's right remains, in my opinion, unaffected by sec. 460.

I have considered the case of *Strang v. Township of Arran*, 28 O.L.R. 106, but I do not think it governs this case. In *Strang v. Township of Arran* the damage arose (if I understand the case) from injury to the plaintiffs' lands, occasioned by deprivation of access over the highway. The defendants failed to repair a bridge forming part of the highway, which bridge and highway was essential to the ready access to the plaintiffs' lands. The claim, therefore, arose directly from the failure of the defendants to repair the highway.

The present action does not arise from anything on the highway, but, as I have indicated above, from something done off the highway, viz., on the plaintiff's lands, so that *Strang v. Township of Arran* has, I think, no application.

It is further suggested that the injury arose from floods and the act of God, and was, therefore, not a thing for which the defendants were responsible. I cannot see that this is the true view to take of the case. For thirty or forty years, through spring and fall, through flood and drought, these lands were in the same position as they now are, and no harm came to them until there was an artificial interference by the defendants with the flow of the surface water.

I think that the appeal should be allowed, and judgment should be entered for the plaintiff for \$125, with costs here and below.

Appeal allowed.

[APPELLATE DIVISION.]

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April 14.

Certiorari—Examination for Discovery in County Court Action—Application for Removal into Supreme Court—Jurisdiction of Examiner—Ministerial Act—Judgment in County Court—Removal of Record—Impossibility of Proceeding upon—Discretion—Advantage—Solicitor—Disputed Retainer—Remedy.

Certiorari will not lie to remove any but a judicial act.

The Court will not remove a record upon which it cannot proceed.

Review of the authorities.

In an action in a County Court, the plaintiff, upon his examination by the defendants for discovery, said that the action was brought without his authority, by a solicitor assuming to act for him. This statement was read at the trial, and upon it judgment dismissing the action was pronounced; there was no appeal from the judgment. The solicitor who had brought the action, contending that the examination for discovery was taken by a Special Examiner without authority or jurisdiction, moved for a *certiorari* to remove it into the Supreme Court for the purpose of having it quashed:—

Held, that what was sought to be removed was a mere ministerial act of an officer of the Court, and it was immaterial whether he had or had not authority to do the act.

- (2) That, if the record, with the judicial act of dismissal of the action, were removed—assuming that the examination would be removed with it—the Court could do nothing with the judgment; it was the judgment of a Court of competent jurisdiction, properly seized of the case.
- (3) That, after judgment, there is a judicial discretion to grant or refuse a *certiorari*; and in this case there would be no advantage in having the examination before the Supreme Court—the County Court had the same power over the proceedings as the Supreme Court would have if they were removed.

- (4) That, even if the examination were quashed, no advantage would be gained by the applicant.

Per MEREDITH, C.J.C.P.:—The solicitor had come for redress into the wrong Court. If there were any irregularity or impropriety in any of the proceedings, any motion respecting them should be made in the County Court; and the dispute as to the solicitor's retainer should be settled by an action in a Division Court, or by summary application to the County Court if collusion between the plaintiff and defendants was charged.

Order of BRITTON, J., refusing the application for a *certiorari*, affirmed.

MOTION by J. B. Mackenzie, solicitor for the plaintiff in an action in the County Court of the County of York, wherein one Joseph Elliott was plaintiff and J. McKee McLennan and another were defendants, for an order for the issue of a writ of *certiorari* to remove into the Supreme Court of Ontario the examination of the plaintiff taken for discovery in that action.

December 3. The motion was heard by BRITTON, J., in Chambers.

The applicant appeared in person.

No one opposed the motion.

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December 16. BRITTON J.:—I am of the opinion that *certiorari* will not lie upon the facts now presented. The ease of *Rex v. Woodhouse*, [1906] 2 K.B. 501, where the whole subject is fully dealt with, is not authority for *certiorari* in a case like this.

The object of the motion for a *certiorari* is to get rid of the judgment. The argument is that, the answers to the questions put to the plaintiff by counsel being the only evidence, there will be nothing upon which the judgment can rest, and the plaintiff will be at liberty to go to trial.

The learned County Court Judge dismissed the action. It is said he did so for alleged reasons that were none in fact. It is said there was no power on examination for discovery to elicit, and particularly by the defendants' solicitor, in the absence of the plaintiff's solicitor, the alleged fact that the plaintiff did not authorise the bringing of the action. Upon principle, I see no difference, apart from collusion between the plaintiff and the defendants' solicitor such as is alleged, and which, if proved, cannot be too strongly censured—I see no difference from the case of deciding upon improper evidence.

The rejection of proper evidence and the admission of improper evidence are grounds of appeal. The law is quite clear that the plaintiff had the right of appeal subject to complying with the law as to time, notice, and other prescribed terms. Where there is such right of appeal, the *certiorari* ought not to be granted.

Certiorari is prohibited in cases of summary conviction where the right of appeal is granted.

Motion refused.

The applicant appealed from the order refusing his motion and moved substantively for a *certiorari*.

March 28. The appeal and motion were heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and MASTEN, JJ

J. B. Mackenzie, the appellant, in person, argued that the examination should be quashed because (1) it dealt with an irrelevant matter; and (2) the examiner had no jurisdiction to take the examination, as the plaintiff resided in the county of Ontario, and his solicitor had not given his consent to an examination in the county of York. He also said that it might

hamper him in his efforts to recover his costs from the plaintiff if the examination were not quashed.

J. M. Ferguson, for the defendants, contended that *certiorari* would not lie to remove any but a judicial act. Here there was only a ministerial act of an officer of the Court to be removed.

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April 14. RIDDELL, J.:—This is an action *qui tam* in the County Court of the County of York.

The plaintiff was examined before John Bruce, Esq., Special Examiner, for discovery: on his examination he said he had not instructed the action to be brought. At the trial, this statement was read, whereupon the learned County Court Judge dismissed the action: no appeal has been taken from this decision.

Mr. Mackenzie, who acted as solicitor for the plaintiff in the County Court, is naturally indignant at the plaintiff's statement reflecting as he thinks upon his professional honour; and he moved before Mr. Justice Britton for a *certiorari* to bring into the Supreme Court the obnoxious examination "for the purpose of being quashed."

My learned brother refused the motion, and Mr. Mackenzie appealed to this Court, joining in his motion a substantive motion for a *certiorari*. As the same considerations govern this additional motion as the appeal, I treat them together.

There is no pretence that our legislation, the County Courts Acts, etc., is of assistance to the applicant—these Acts might hamper, they cannot assist—and the application is merely as at the common law.

The two grounds alleged in the original notice of motion are: (1) that the examination dealt with an irrelevant issue; and (2) Mr. Bruce (the Special Examiner) had no jurisdiction to take the examination, as the plaintiff resided in the county of Ontario, and his solicitor had not given consent to an examination in this county.

For the purpose of this judgment, I propose to take it for granted that both grounds express a correct view of the law, i. e., that the examination was on an irrelevant issue (though I am appalled when I think of the percentage of examinations for discovery which might be quashed were this a good ground for quashing), and that Mr. Bruce had no authority for holding the

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examination: Rule 345 (1); *Maclean v. James Bay R. W. Co.* (1905), 5 O.W.R. 440; *Dryden v. Smith* (1897), 17 P.R. 500.

Yet I cannot but think that the application has been made without full consideration of the real functions of *certiorari* and the rules which the Court has laid down for its own guidance and the limitation of its activities. The writ is a most valuable one, and the power to grant it could not be abdicated without danger to the administration of justice; but the power is not to be exercised in every case in which an applicant thinks it would or might advantage him.

The nature and objects of "*certiorari*" are so fully discussed in the judgment of the Appellate Division in *Rex v. Titchmarsh* (1914), 32 O.L.R. 569, at pp. 577, 578, that it is unnecessary again to dilate upon them—it is sufficient to quote one sentence: "The theory is that the Sovereign has been appealed to by some one of his subjects who complains of an injustice done him in an inferior Court; whereupon the Sovereign, saying that he wishes to be informed—*certiorari*—of the matter, orders that the record etc. be transmitted into a Court where he is sitting."

That Court at the common law is the Court of King's Bench—all the powers of the English Court of King's Bench were for this Province vested in the Court of King's Bench for the Province of Upper Canada by the Provincial Act of 1794, 34 Geo. III. ch. 2, sec. 1—and by several Acts of the Legislature these powers were continued and are now in the Supreme Court of Ontario.

There are many difficulties in the applicant's way—more than one, in my view, most serious. I do not propose to go into all of them; it will suffice here to mention one which lies at the threshold and is fatal.

The jurisdiction to grant *certiorari* is and always has been jealously preserved; but the Court, while insisting on its power, has been careful to observe the limits within which it will be exercised.

As early as 1751, in Michaelmas Term, 25 Geo. II., it was decided by the Court of King's Bench that nothing but a judicial act will be removed by *certiorari*. The remedy against an offender for a wrongful ministerial act is by action: *The King v. Lediard* (1751), Sayer 6.

This was followed in *Rex v. Lloyd* (1783), Caldecott 309, in which Mr. Justice Buller (than whom there never was a greater

master of the common law) says: "It is settled in the case of *The King v. Lediard* that a *certiorari* does not lie to remove any other than judicial acts." That the examination was wholly illegal in the present case is shewn by *Rex v. Lloyd* to be immaterial—"Bower (counsel for the applicant, who had obtained a rule to shew cause) urged that this act of the Sessions was clearly illegal . . . The Court admitted this . . . but did not change the determination to discharge the rule."

These cases are considered and followed in *Rex v. Woodhouse*, [1906] 2 K.B. 501, by Vaughan-Williams, L.J., p. 512. It is true that the decision of the Court of Appeal was reversed in Dom. Proc., *sub nom. Lord Mayor, etc., of Leeds v. Ryder*, [1907] A.C. 420, but it was not suggested that the law in these cases was not sound. All the cases of importance are considered in one or other of the judgments in the case just cited—and the result is plain that *certiorari* will not lie to remove any but a judicial act.

In the present case what is to be removed is a mere ministerial act of an officer of the Court—that he had no authority to do this act (if such is the case) is immaterial.

It may be contended that we have power to remove the record with the judicial act of dismissal of the action, and that on such removal the obnoxious examination will be transmitted also to this Court. That the examination would come up with the record I do not determine—but, granting that this is the case, the applicant is not advanced.

Aside from other difficulties, the Court will not remove a record upon which it cannot proceed.

There has only been one instance in which a contrary rule was followed, and that in the evil days when the King was actually a ruler, when he took a personal interest in his Courts, and when a *supersedeas* might be confidently expected by a Judge bold enough to act contrary to His Majesty's wishes. James, Duke of York, afterwards James II., King of England (James VII. of Scotland), was, in the reign of his brother Charles II., presented by the Grand Jury at the Quarter Sessions under the statute 3 Jac. I. ch. 4, for not going to church (i.e., the established Church of England, for he attended his own, the Roman Catholic, church faithfully enough.) This was part of the long and violent struggle

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to exclude him from the succession to the Crown, which failed through the firmness of the King. The presentment was removed on *certiorari* into the King's Bench, and nothing more was heard of it—this order of the Court was rather political than judicial, and has been uniformly and consistently condemned.

The first reported case in which this decision was considered is *Dr. Sands' Case* (1690), 1 Salk. 145, in which Holt, C.J., speaking for the Court, expressly disapproves the Duke of York's Case and indicates the rule I have stated.

We could do nothing with the judgment if we had it before us—there is no appeal taken, and the judgment is the judgment of a Court of competent jurisdiction, properly seized of the case.

It would be impossible for us to order this record to be removed, and we cannot bring up the examination by itself.

There is another consideration which should be weighed, even if other difficulties were out of the way.

It is pointed out in *Re Aaron Erb* (1908), 16 O.L.R. 597, that after judgment there is always a judicial discretion to grant or refuse a *certiorari*. In the present case I cannot understand what advantage there would be to have the examination before this Court. Everything is in the County Court of the County of York; and that Court has the same power over the proceedings now as we should have were they here. Any application which could be made in the Supreme Court can be made in the County Court—and I venture to think the latter the proper tribunal.

Nor am I able to see any advantage to be gained by an application to quash the examination, even if successful.

So far as the judgment is concerned, the examination has done its work, and that cannot be undone—if it is proposed to punish the examiner for his alleged excess of power, the examination in existence will be more useful than the examination quashed—or at least as useful.

Mr. Mackenzie contends or suggests that it might hamper him in his efforts to recover his costs from the plaintiff—but I cannot follow that argument. If the plaintiff is sued, his evidence before the examiner cannot be used for him: if Mr. Mackenzie wishes to make use of it, he may use it as a statement of his client, but he need not—his rights would not become greater by quashing the examination.

The dispute by client of retainer is too common to call for remark—so common is it that a general rule has been adopted by the Courts to cover the case. It is rare that there is a direct contradiction of fact, often there has been a misunderstanding, between the solicitor and his supposed client, and not seldom a view occasioned by the desire of an unsuccessful litigant to get out of paying the costs. Paying for a dead horse is proverbially unpleasant. The Courts have laid down the rule that, if there be nothing more in the case than the word of the solicitor against the word of the person he alleges to be his client, the word of the latter is to be taken—accordingly the prudent solicitor takes his retainers in writing. Most of those who would refuse to sign a written retainer either do not have much wish to go to law or intend to beat the solicitor out of his costs if they should be called upon to pay them.

Erskine is said once to have told a jury “the reputation of a cheesemonger in the city of London is like the bloom upon a peach. Breathe on it—and it is gone for ever!!” In view of the frequency of clients repudiating their retainers, it cannot be said that the evidence of the plaintiff will produce any appreciable damage to the solicitor, however exasperating it may be.

I think on all grounds the appeal fails, and it, with the substantive motion, must be dismissed with costs.

LENNOX and MASTEN, JJ., concurred.

MEREDITH, C.J.C.P.—Mr. Mackenzie’s indignation, as a solicitor, at having his retainer, in a County Court action, repudiated, has got the better of his judgment as a member of the Bar, and brought him into the wrong Court seeking redress; that I quite understood him, at the conclusion of his argument of this appeal, to admit; but, whether admitted or not, it is quite too plain to be the subject of any kind of doubt, that is, as to his being in the wrong Court.

If there were any irregularity or impropriety in any of the proceedings in the action in the County Court, any motion respecting them should be made in that Court, which is a court of record, having the same practice, and, generally speaking, the same power, in all cases within its jurisdiction, as the High Court

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Division of this Court has in cases within its jurisdiction, with ample right of appeal, from each Court, directly to this Court.

Whether the proceedings in the County Court were regular or irregular, and whether either solicitor was or was not retained in it, the action is the action of the parties, not of the solicitor, and they may discharge, or repudiate, solicitors, and carry on, or end, the action as they see fit, subject to this: that, if there be collusion between them, for the purpose of defeating a solicitor's right to costs, the Court can, at the instance of the solicitor, interfere to prevent that purpose being carried into effect.

The solicitor's way is a plain one, leading not to this Court, but to the Division or the County Court. He may render his bill of costs, and, in due course, sue for the amount of it in the proper Court, no doubt the Division Court; or, if he charge collusion, by the defendants with the plaintiff, to deprive him of his costs in the action, he may apply to the County Court, in a summary manner, for an order for payment of them by them.

Britton, J., properly dismissed the application to him, a writ of *certiorari* being out of the question; and this appeal must meet with the same fate.

Appeal and motion dismissed with costs.

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April 14

[IN CHAMBERS.]

DUNN v. PHILLIPS.

Practice—Specially Endorsed Writ of Summons—Statement of Claim Treated as Amendment—Rules 111, 127.

Where the writ of summons is specially endorsed, the endorsement may be treated as a statement of claim, and no other statement of claim is necessary (Rule 111); but the plaintiff is entitled, under Rule 127, to amend the claim specially endorsed on the writ.

Where the plaintiff, in an action commenced by a specially endorsed writ, delivered a statement of claim, setting forth facts and particulars not mentioned in the endorsement, and such as would have reasonably been embodied in an amendment under Rule 127, the statement of claim was treated as an amendment, the word "Amended" being added to it.

Dunn v. Dominion Bank (1913), 5 O.W.N. 103, distinguished.

APPEAL by the defendant from an order of a Local Judge dismissing a motion by the defendant to set aside a statement of claim delivered by the plaintiff.

March 28. The appeal was heard by KELLY, J., in Chambers.
A. E. Langman, for the defendant.
Grayson Smith, for the plaintiff.

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April 14. KELLY, J.:—Rule 111 provides that where a writ is specially endorsed the endorsement may be treated as a statement of claim, and no other statement of claim shall be necessary. In the present instance, the form of writ used is that intended as a specially endorsed writ, and it gives warning to the defendant that, it being specially endorsed, he is liable to have judgment entered against him should he fail to enter an appearance and file and serve the affidavit referred to. The claim endorsed is for the recovery of possession of land. The plaintiff has held it forth as a specially endorsed writ, and for the present purpose it must be so considered. While, according to the Rule, a further statement of claim was not necessary, the plaintiff was entitled, under Rule 127, to amend the claim specially endorsed on the writ.

The statement of claim now objected to is not a mere reiteration of the claim endorsed on the writ—which was the case in *Dunn v. Dominion Bank* (1913), 5 O.W.N. 103—but sets forth facts and particulars—not mentioned in the endorsement on the writ—which are helpful to a proper submission and understanding of the plaintiff's claim, and as such would reasonably have been embodied in such an amendment as is permitted by Rule 127.

I see no reason why, simply because the new document is not expressed to be an amendment, it should not now be so treated. All that is wanting to put it strictly within the Rule is the addition of the word "Amended."

That it is *de facto* an amendment is apparent.

The statement of claim delivered should be treated as an amendment under Rule 127; and, to conform strictly to the Rule, it should be made to appear on its face that it is an amendment; subject to this, the appeal will be dismissed, but without costs.

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[MIDDLETON, J.]

April 14.

RE PERRAM AND TOWN OF HANOVER.

Municipal Corporations—Expropriation of Leasehold and Water Power—Compensation—Value of Rights—Business Loss or Gain—Deduction of Rent—Costs—Award—Right of Appeal—Public Utilities Act, R.S.O. 1914, ch. 204, sec. 4—Application of Part XVI. of Municipal Act, R.S.O. 1914, ch. 192.

Part XV. of the Municipal Act, R.S.O. 1914, ch. 192, being made, by sec. 4 of the Public Utilities Act, R.S.O. 1914, ch. 204, to apply to the taking of lands by a municipality under the latter Act, and providing for the determination by arbitration of the amount to be paid, the provisions found in Part XVI., which are auxiliary to the provision in Part XV. giving the right to arbitrate, also apply; and, therefore, the right to appeal from the award, expressly conferred by Part XVI., exists.

A town corporation, having leased to P., for three years, a factory building and premises with the right to use a water power, expropriated, when the lease had a year to run, the leasehold and water right, for use in connection with their pumping plant. Upon appeal by P. from an award and finding of arbitrators that he was entitled to no compensation or damages, and should pay the costs of the proceedings:—

Held, that the municipality should pay the value of what they had expropriated; and could not set off against that value the loss that P. might sustain if he continued to use the premises in the business of making wool or yarn; nor could P. claim from the municipality the profit which he might have made if he had continued in business, for the expropriation of the premises did not necessarily involve his discontinuing his business.

P. should be allowed the value of the power for one year, the value of the use and occupation of the building, and a reasonable sum for the expense of removing his business to some other premises; one year's rent should be deducted from the amount allowed, and also a sum due for rent at the time of expropriation; and the costs of arbitration and appeal should be paid by the municipality, who had made no offer of compensation.

AN appeal by Perram from the award of the majority of three arbitrators upon the appellant's claim for compensation for the loss of leased premises taken by the Corporation of the Town of Hanover under the Public Utilities Act, R.S.O. 1914, ch. 204.

April 12. The appeal was heard by MIDDLETON, J., in the Weekly Court at Toronto.

H. S. White, for Perram.

E. D. Armour, K.C., and *F. S. Mearns*, for the town corporation.

April 14. MIDDLETON, J.:—A preliminary objection was taken by the respondents that no appeal would lie from the award in question. By the Public Utilities Act, sec. 4, Part XV. of the Municipal Act, R.S.O. 1914, ch. 192, is made applicable to the exercise by the corporation of the powers conferred by the

statute in question. This Part, covering secs. 321 to 331 of the Municipal Act, gives power to expropriate land required for a municipal purpose, and it provides, sec. 325 (2), that if the compensation is not agreed upon it shall be determined by arbitration. The provisions as to arbitration, however, are found in Part XVI. of the statute, and these provisions have been assumed to apply. The arbitration has been had and the award made upon this assumption. The municipality now object that, Part XV. only having been 'made applicable, and the right to appeal from the award being found in Part XVI., there is no right to appeal.

I cannot agree with this contention. It seems to me that when Part XV., giving the right to expropriate, is made to apply to the taking of lands under the Public Utilities Act, and it provides for the determination by arbitration of the amount to be paid, the provisions found in Part XVI., which are auxiliary to the provision found in Part XV. giving the right to arbitrate, also apply; and, therefore, the right to appeal, expressly conferred by Part XVI., exists.

The situation developed before the arbitrators is this. The town corporation owned a factory building adjoining a stream flowing from the town. The factory had been operated by power taken from the head-race and pond used for the storage of water retained to develop power further down stream.

On the 30th May, 1913, the town corporation leased to Per-ram this factory building and premises for a term of three years, with the right to take from the race or mill-pond sufficient water to give 12 horse power in the mill, at an annual rental of \$200.

For the purpose of establishing and operating a pumping station down stream, the municipality desired to acquire this leasehold and water right, so that the whole water power might be available for the pumping plant; and the necessary by-laws for effecting that purpose were passed; and, under a jurisdiction assumed to exist, the County Court Judge made an order giving the municipality immediate possession of the leased premises during the currency of the lease and while it had yet about a year to run. Under this order possession was taken and the arbitration was had to fix the compensation.

The mill, though called a woollen mill, was chiefly used for

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making yarn, and Perram claimed to have been damnified to the extent of \$1,600, upon the theory that, had his business been continued in these premises till the expiry of the lease, he would have realised this profit from the business. The town, on the other hand, took the position that Perram's business was not and could not be successful from a business standpoint, and that he had in fact sustained no damage by reason of the expropriation, that in fact he ought to have been thankful for this strangulation of a business in which he was bound to lose money. The majority of the arbitrators have apparently acquiesced in this view, for they have awarded him no damages, and have directed him to pay the costs of all the proceedings.

Perram's claim was largely based upon the expectation of making profits out of war contracts which might come his way, and it is by no means clear that the arbitrators were satisfied that no profit would have been made, for they say: "We do not doubt that there was a probability of this mill being worked at a profit if Perram had been able to open up the mill after September, 1914, when the war made an active demand for yarns, but under the most favourable circumstances we think such profits have been greatly exaggerated."

With all respect to the arbitrators and to the parties, it seems to me that the case has been approached from a wrong standpoint. What the municipality are called upon to pay is the value of that which they have expropriated, and it appears to me that they cannot set off against this value the probable loss that Perram might have sustained if he had continued in business, nor can Perram claim from the municipality the profit that he thinks he might have made if he had continued in business, for the expropriation of this particular building did not necessarily involve his discontinuing his business.

The evidence, not having been presented from what seems to me to be the proper standpoint, is by no means satisfactory. Doing the best I can with it, and allowing to Perram the value of the 12 horse power which he was entitled to for one year, and the use and occupation of the mill, and allowing him a reasonable sum for the expense of removing his business to some other premises, and deducting from this the amount he would have to pay for rental, \$200, I would fix his compensation at \$300.

It is said that there was \$100 additional due by him for rent at the time of expropriation. This, I think, may well be set off so that his recovery would be reduced to \$200; and I do not see why the costs of the arbitration and of the appeal should not follow the event—for no compensation appears to have ever been offered by the town corporation.

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April 15.

ATTORNEY-GENERAL FOR ONTARIO V. CADWELL SAND AND
GRAVEL CO. LIMITED.

Parties—Action by Provincial Attorney-General against Contractor Employed by Dominion Government—Removal of Sand and Gravel from Bed of Navigable Waters—Rights of Province and Dominion—Addition of Attorney-General for Dominion as Defendant—Rule 134.

In an action by the Attorney-General for Ontario to recover the value of sand and gravel removed by the defendant company from the beds of the River St. Clair and Lake Erie, it appeared that the defendant company took the sand and gravel in the course of dredging the river and lake to construct a steamboat channel, under a contract with the Dominion Government; and, there being a dispute as to whether the right was in the Province or the Dominion, the Attorney-General for the Dominion was, upon his own suggestion, through the defendant company, added as a party defendant, "to enable the Court effectually and completely to adjudicate upon the questions involved in the action:" Rule 134.

MOTION by the defendant company for an order adding the Attorney-General for the Dominion of Canada as a party defendant.

April 14. The motion was heard by MIDDLETON, J., in Chambers.

A. D. Langmuir, for the defendant company.

Harcourt Ferguson, for the plaintiff.

April 15. MIDDLETON, J.:—The plaintiff, as Attorney-General for the Province, sues to recover a very large sum of money, the value of sand and gravel removed by the defendant company from the bed of the River St. Clair and the bed of Lake Erie, the title to which he alleges is in the Province.

The defendant company, it appears, is a contractor employed by the Dominion Government, and the dredging of the river and

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lake, it is said, was for the purpose of constructing a steamboat channel for the use of vessels navigating the Great Lakes.

The Minister of Justice has communicated with the solicitors for the defendant company, and asked that the Attorney-General for the Dominion of Canada be added as a party defendant, so that the rights of the Dominion and Province may be adjudicated upon in this action. The defendant, naturally regarding the wishes of the Government, thereupon makes this application, which is opposed by the plaintiff.

The defendant company could undoubtedly bring the Dominion before the Court by claiming indemnity or relief over; and, inasmuch as constitutional precedents are involved in the litigation, under the requirements of the statute notice would have to be given to the Minister of Justice so that he might be heard upon the trial in support of the rights of the Dominion. The Minister of Justice, however, takes the position that the Dominion ought to be formally a party to the litigation, so that his status in it for all purposes should be unquestionable.

Save in so far as it is necessary to secure this indubitable status, the question is one of form rather than of substance, for the Dominion must be before the Court; and, even with respect to the comparatively unimportant matter of costs, the Court has full jurisdiction in proper cases to direct the plaintiff to pay the costs, not only of the defendant but of the third parties.

I think the case is one which comes within the spirit and the letter of Rule 134, and that the representative of the Dominion is one "whose presence is necessary in order to enable the Court effectually and completely to adjudicate upon the questions involved in the action;" and analogy is afforded by the Rules which allow a landlord, without leave, to appear to defend his tenant's possession (Rule 53).

The sand having been removed from the bed of the river, which the Dominion claims to be within its right, it is, I think, only fit and seemly that it should be a party to the action, to defend that which has been done through its contractor. The order is therefore made. Costs in the cause, subject to any disposition that may be made by the trial Judge.

[APPELLATE DIVISION.]

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SMITH v. DARLING.

Jan. 20.
April 19.

Limitation of Actions — Mortgage — Redemption — Infant — Disability — Limitations Act, R.S.O. 1914, ch. 75, sec. 40—Application of—Action for Recovery of Land.

The disability sections of the Limitations Act do not apply to actions to redeem.

Review of the legislation and decided cases.

The decision of the Court of Appeal in *Faulds v. Harper* (1884), 9 A.R. 537, followed. The judgment of the Supreme Court of Canada in that case (1886), 11 S.C.R. 639, though it reversed the judgment of the Court of Appeal, proceeded on an entirely different ground from that upon which the case was decided in the Court below, and the expressions of opinion of Strong and Henry, JJ., as to the application of the disability clauses (as to which there is much conflict in the decided cases) were only *obiter*.

Judgment of LENNOX, J., reversed.

ACTION brought by Bernard Smith against Thomas J. Darling, William Henry Toner, and William Toner, for redemption and an account, in the circumstances stated below.

October 8, 1915. The action was tried by LENNOX, J., without a jury, at Kingston.

A. B. Cunningham, for the plaintiff.

J. L. Whiting, K.C., and *W. F. Nickle*, K.C., for the defendants the Toners.

J. A. Jackson, for the defendant Darling.

January 20. LENNOX, J.:—The plaintiff claims as one of the heirs at law of his mother, Margaret Ann Smith, who died intestate on the 10th June, 1902, leaving her surviving her husband, Benjamin B. Smith, and nine children, including the plaintiff. The plaintiff was then an infant under the age of eleven years, and upon his mother's death became entitled to a two-twenty-seventh share of her estate and effects after payment of debts. It will be convenient to refer to Margaret Ann Smith as "Mrs. Smith."

Mrs. Smith owned lot No. 6 fronting on Nelson street in the city of Kingston, and lot No. 18 in the 6th and the south-east quarter of lot No. 19 in the 7th concession of the township of Storrington, in the county of Frontenac, aggregating 72 acres, subject to a mortgage to Elizabeth Smith. Separating the properties, the following facts are established or admitted:—

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First as to the township property. Mrs. Smith had mortgaged it to Maggie Bailey and others for \$1,500. The interest was in arrear in or before April, 1901; and Darling says—though there is no proper evidence of this—that the mortgagees had commenced an action to foreclose. This much, however, can be accepted without qualification: that the Smiths requested Darling, and he agreed with them, to pay off the Bailey mortgage, so as to save the property for Mrs. Smith, and that he was to reimburse himself by taking a mortgage upon the same property.

The Bailey mortgage was paid off, and on the 23rd April, 1901, Darling took a mortgage for \$2,500, and at a higher rate of interest than was secured by the mortgage paid off. It is not stated how far the foreclosure proceedings had been carried, or whether an account was ever taken or a day fixed for payment. Darling paid the mortgagees \$1,708.63 in full of the principal, interest, and costs owing upon their mortgage. Included in the mortgage taken by Darling, and going to make up the \$2,500, was the Smiths' previous indebtedness to Darling, which had been secured by chattel mortgage, and a collateral second mortgage on the Kingston property. These facts in the main are set out in the statement of defence of this defendant.

Darling took an assignment of the Bailey mortgage. There was no agreement or understanding with the Smiths that he should do so; for he does not say that there was, and it is distinctly contrary to what he alleges in his pleadings that this mortgage should be kept alive; and it is not shewn that Mrs. Smith was ever aware of what had been done or that the plaintiff knew of it before the delivery of this defendant's statement of defence.

Even if it could be argued that this defendant had a right to take an assignment of the Bailey mortgage and retain it as a charge or lien upon the land—and I am clearly of the opinion from the formal statement of his defence that he had no such right—the total claim made in the action, including the costs, had been paid, and the time extended, and new terms agreed upon by the new mortgage; and it would at least be necessary that an account or a new account be taken and a day and place for payment appointed, and this, of course, only after Darling had been added as a party to the action and after notice to all persons affected by the proceedings.

As I have already stated, Mrs. Smith died on the 10th June, 1902. Assuming that the Bailey action was still pending, and that the parties who had been prosecuting it could still proceed, notwithstanding that there was nothing owing to them, after the death of Mrs. Smith the action at least must be revived before any effective proceeding to realise upon the mortgage or get in the equity of redemption of the mortgagor, or her representatives or her heirs, could be taken: *Kennedy v. Foxwell* (1906), 11 O.L.R. 389, 393. As to other requirements, see Rules 463, 466, 485 (2); *Independent Order of Foresters v. Pegg* (1900), 19 P.R. 254; and Holmsted's Judicature Act and Rules, pp. 1034, 1035, 1036.

Without re-constitution of the action or a new account, or perhaps any account, or new day, or notice to anybody, so far as appears, or reviving the action, a final order of foreclosure was taken out on the 12th September, 1903—it is said in the order upon the application of the original plaintiffs, the mortgagees; the defendant Darling agreed to pay off and says he paid in full pursuant to his agreement with the Smiths. On the same day, the plaintiffs in the foreclosure action, settled and paid in April, 1901, executed a quit-claim deed to Darling.

On the 30th June, 1904, the defendant Darling purported to convey the township lots to Walter Toner in consideration of \$2,150. Strangely enough, it would appear from this defendant's statement of defence, para. 8, that the interest of Benjamin B. Smith in the equity was recognised down to this time.

On the 5th June, 1907, Walter Toner conveyed eight or nine acres, parts of the township lots, to the Perfect Brick and Tile Company for \$2,150. It is said that the company erected a plant upon these lands. The business was not profitable, and has been discontinued.

On the 27th December, 1912, the plaintiff attained the age of twenty-one years. This action was commenced on the 4th June, 1915. The defendants all plead the Statute of Limitations. Upon the argument I did not understand counsel for the Toners to rely upon the statute. Mr. Jackson, for the defendant Darling, however, strenuously urged that as to both properties the plaintiff is barred under the statute by lapse of time, that the statute applicable is the Real Property Limitation Act, R.S.O. 1897,

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ch. 133, and that the limit of time for an action to redeem is the ten years mentioned in sec. 19 of that Act, relating to a mortgagee in possession; that sec. 43, the disability section of ch. 133, does not include an action for redemption of a mortgage, and sec. 40 of the Limitations Act, 10 Edw. VII. ch. 34, which would include an action to redeem, cannot be invoked.

If any Statute of Limitations is applicable in the circumstances here disclosed, I think it is R.S.O. 1897, ch. 133; although this appears to conflict with the rule recognised both at the trial and upon rehearing in *Dumble v. Larush* (1878-9), 25 Gr. 552, 27 Gr. 187: a very significant case, for the bill was filed on the 13th March, 1876, and the plaintiff would have succeeded, under the statute as it then was, if the bill had been properly framed, but he was compelled to amend because he had mentioned the wrong half of the lot; the amendment was not made until the 27th September; in the meantime a new statute came into force on the 1st July, 1876, cutting down the time from twenty to ten years, and, the new statute being held to govern his rights, the plaintiff failed. See also *Harris v. Prentiss* (1880), 30 U.C.C.P. 484. The judgment in this case was varied in *Harris v. Mudie* (1882), 7 A.R. 414, but without disturbing this point.

On the other hand—and it is binding upon me—the rule contended for by Mr. Jackson appears to have been recognised without question both in the Court of Appeal and the Supreme Court of Canada in *Faulds v. Harper* (1884-6), 9 A.R. 537, 11 S.C.R. 639.

It is just possible that upon a careful analysis the cases can be reconciled; but I have not been referred to any authorities upon this point and have not gone into it carefully; for, notwithstanding the very ingenious argument presented by counsel for Mr. Darling, I am not able to detect any difference in substance or effect between sec. 43 of the earlier and sec. 40 of the later Act.

Section 43 of R.S.O. 1897, ch. 133, says: "If at the time at which the right of any person to make an entry or distress, or bring an action to recover any land or rent, first accrues as in sections 4, 5, and 6 mentioned," such person, if under disability, has the time extended to make an entry or a distress, or bring an action. Section 40 of the Act of 1910 (and it is not a revision or consolidation) is identical in language, except that for "first

accrues as in sections 4, 5, and 6 mentioned," are substituted the words "first accrues, as herein mentioned." How can the difference in wording produce a difference in meaning or effect? The time when the right "first accrues" is defined by secs. 4, 5, and 6 of R.S.O. 1897, ch. 133. The same thing is defined in just the same way in secs. 5, 6, and 7 of the Act of 1910.

The introductory reference in both sections is 'to the first accrual of the right, and to nothing else; and in equally clear and unmistakable language in the one case as in the other. In both statutes the section is subsequent to the section *primâ facie* limiting the time for redeeming a mortgagee in possession. It is possible that neither of these sections applies to an action to redeem, but it is impossible to argue that one of them does and the other does not.

Assuming, however, that either one of these statutes applies, no matter which, this does not really determine anything; for the crucial question still is: Is an action to redeem the mortgage of a mortgagee in possession of "the lands comprised in this mortgage"—*in possession within the meaning of sec. 19*—"an action to recover land" within the meaning of sec. 43?

Were it not that eminent Judges here and in England have said that it is not, it would not have occurred to me that there could be a doubt about it, particularly with the sections collocated as they are in R.S.O. 1897, ch. 133. I need not and I am not at liberty to speculate as to this. It was held by our Court of Error and Appeal in *Hall v. Caldwell* (1861), 7 U.C.L.J.O.S. 42, that a similar saving section included an action to redeem. In 1884, in *Faulds v. Harper*, *supra*, a majority of the Judges of the Court of Appeal did not consider this the proper construction of the Limitations Act of 1874; but in that Act the section providing for bringing an action to redeem the mortgage of a mortgagee in possession was, in the arrangement of the statute, subsequent to the savings for disabilities clause, the reference to the accrual of the right was "as hereinbefore mentioned," and the judgments of Burton and Patterson, J.J.A., in which Morrison, J.A., concurred, are largely, if not mainly, rested upon this. The judgment of the Court of Appeal was reversed.

It is true that the judgment of the Supreme Court of Canada in *Faulds v. Harper* did not turn upon the construction of the

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statute, but upon a ground which I regard as clearly entitling the plaintiff to maintain this action, whatever may be the limit or scope of sec. 43, namely, that the mortgagee in that case, as in this, through whom the defendants claimed, obtained possession of the mortgaged land and set up absolute ownership therein, by a fraudulent disregard of his duty to protect the heirs of the mortgagor, and an abuse of the process of the Court, and could not be treated as a mortgagee in possession, but as a trustee for the plaintiff, against whom no time-limit could be set except such as might be dictated by the conscience of the Court by reason of the misconduct, acquiescence, or laches of the claimants, or the consideration to be shewn to subsequent *bonâ fide* purchasers for value without notice; as, for instance, in the case of *Skæ v. Chapman* (1874), 21 Gr. 534. This, too, in my opinion, is the unanswerable argument of the plaintiff to the defendants' plea in bar of his right to maintain this action; but, as it is not the only answer, I have thought it right to deal with the Statute of Limitations as well; as did Mr. Justice Strong in the *Faulds* case. At p. 655 he says: "It follows, therefore, that the decree pronounced by the Divisional Court on the rehearing, although for reasons differing from that Court, was substantially right. I think it well, however, to add that if I had to choose between the decision in *Caldwell v. Hall* (1860), 6 U.C.L.J.O.S. 141, S.C., *sub nom. Hall v. Caldwell* (1861), 7 U.C.L.J.O.S. 42, 8 U.C.L.J.O.S. 93, and those in *Kinsman v. Rouse* (1881), 17 Ch. D. 104, and *Forster v. Patterson* (1881), 17 Ch. D. 132, I should certainly have agreed with the learned Judges of the Divisional Court; for the reason that since the two cases in 17 Chancery Division were decided, the House of Lords has held in *Pugh v. Heath* (1882), 7 App. Cas. 235, that a foreclosure suit is an action for the recovery of land. This being so, it follows *â fortiori* that a redemption suit is also an action or suit for the recovery of land. And it is impossible, without doing violence to the words of the statute, to hold that the saving of disabilities does not apply to an action or suit, as well in equity as at law, for the recovery of land." In the judgment of Strong, J., and therefore in this strongly expressed opinion, Sir W. J. Ritchie, C.J., and Fournier and Taschereau, JJ., concurred without qualification.

So far as it relates to the Storrington township lots, this action is not distinguishable from *Faulds v. Harper*, except that

here acquiescence or laches is not pleaded, or argued, and could not, upon the evidence, be urged; and that the ultimate owner under Andrew Faulds could not, and those claiming under Darling could, by the exercise of reasonable diligence, have discovered that the mortgagee had not acquired an absolute estate in fee. It is impossible to allow the foreclosure order and quit-claim deed or either to stand to the prejudice of the plaintiff, and in this case, as in *Faulds v. Harper*, the mortgagee having obtained possession and dealt with it not as a mortgagee but as ostensible owner, he cannot now be allowed to shift his position: see judgment of Strong, J., in *Faulds v. Harper*, 11 S.C.R. at pp. 646-7-8, quoting and adopting the judgment of Spragge, C.J.O., in the Court of Appeal.

I need not consider whether the order obtained is void or only voidable. Judicial opinion upon this point is not uniform—not always uniform in the same case. It is unimportant here, as I do not propose to disturb the parties claiming under Darling. Although there may be no legal obstacles, it is still a question in the discretion of the Court whether the relief granted would be *in rem*, or *in personam* only. The Perfect Brick and Tile Company is not a party to the action.

I may now state the following conclusions:—

1. The defendant Darling has not, nor has any person claiming through him, been in possession as mortgagee, and the Statute of Limitations does not apply.

2. Nothing has been shewn which would justify the Court in refusing to aid the plaintiff.

3. If the statute can be held to apply, then, upon the authority of *Hall v. Caldwell*, and with the deliberate opinion of the Judges of the Supreme Court, above quoted, and the relative position of secs. 19 and 43 as a guide, I am unhesitatingly of opinion that sec. 43 includes an action to redeem, and limits and controls the operation of sec. 19.

4. Even if it should be held that the statute does apply, and sec. 43 does not include an action to redeem, and that the plaintiff cannot recover as upon an action for redemption *eo nomine*, yet he should not be left wholly without remedy, and the action should be treated as “an action for recovery of land,” and the plaintiff afforded relief in this action upon equitable terms, such

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as payment of the mortgage, compensation for lasting improvements, and the like. This would probably necessitate adding the brick company, amendment of the pleadings, and doing more for the plaintiff than he has done for himself. I regard this as an entirely proper course in some cases. There never should be two actions when one can be made to secure substantial justice to all parties. However, I rest my judgment upon paras. 1, 2, and 3. The plaintiff is entitled to a remedy under these. For the right of one heir to sue without joining co-heirs and the way in which relief is worked out, see *Pearce v. Morris* (1869), L.R. 5 Ch. 227; *Rakestraw v. Brewer* (1726), Sel. Ca. Ch. 55; *Averill v. Taylor* (1853), 4 Selden (N.Y.) 44; *Tarn v. Turner* (1888), 39 Ch. D. 456; *Faulds v. Harper* (1882), 2 O.R. 405, at pp. 411, 414, and S.C., 11 S.C.R. at p. 657.

It will be convenient now to refer to matters affecting the Kingston property, covered by a separate mortgage, as my judgment will include both.

On the 24th July, 1900, Mrs. Smith and her husband executed a mortgage to S.S. Guess for \$400. Interest on this was paid until the 24th January, 1904. Mrs. Smith died on the 10th June, 1902. The Guess mortgage was assigned to Darling on the 24th May, 1904. The amount then owing upon it with accruing interest was \$410. According to its terms, the principal money fell due on the 24th July, 1905. The auction sale was called for the 12th May, 1906. Darling says that proceedings for sale were taken, but he gives no particulars, and no papers are produced except the poster, exhibit 8. He does not say that a notice of sale was served upon any one, or where the bills were posted, or that they were posted at all. There is no record produced as to the biddings or what took place when the property was offered. No conditions of sale were produced, nor does Darling give any account of the sale beyond saying that sufficient was not offered to cover his claim, and he thinks he bid the property in. The bill gives no particulars of the property except its identification by number and metes and bounds, and it is not anywhere stated that, when he contracted to sell it, he obtained its full value. He says he rented it when he could. The mortgage provided for notice in case of default. I cannot regard what is shewn as evidence of a legal or effective sale, or that,

taking all the evidence adduced, it changed the character of Darling's interest from that of mortgagee to an ownership in fee. But a mortgagee can take possession simply without any attempt to sell; and, as what he did was not in any sense fraudulent, I think when he rented the property he occupied it by his tenant and became a mortgagee in possession, within the meaning of sec. 19 of R.S.O. 1897, ch. 133.

It is not shewn when he rented the property, and the exact date is unimportant, as it was subsequent to the attempted auction sale, and action brought within ten years in either case.

Benjamin B. Smith, upon the death of his wife, became entitled to a one-third or nine-twenty-seventh share of her equity in the Kingston property, and, by a deed reciting the equity as still subsisting, acquired the shares of four of the heirs, equal to an eight-twenty-seventh interest, and it is alleged in Darling's statement of defence that subsequently—about June, 1904—Smith conveyed his seventeen-twenty-seventh share of the equity in these lands to the defendant Darling.

The defendant Darling, on the 29th April, 1910, purported to sell to Frey, for \$750, payable in instalments. Frey probably went into possession; and, except for the suggestion that Darling rented when he could, there is nothing to shew possession before that date. As I have said, it does not matter. Frey seems to have paid a few dollars, and sold or agreed to sell to Wilder; and, in pursuance of this, Darling, on the 1st February, 1911, entered into an agreement to sell to Wilder, in consideration of the amount owing by Frey, \$721.68. Wilder had reduced this to \$571.16 by the 1st June, 1915. Wilder is not made a party to the action.

This is how the Kingston property stands. The defendant could not confer a better title than he had. This was the title of a mortgagee in possession, who entered without legal procedure as mortgagee, and the seventeen-twenty-seventh share of the equity acquired by purchase, and necessarily subject to his own mortgage.

As to the Kingston property, sec. 19 of the statute applies, but ten years have not run since the plaintiff's right of action first accrued. He is entitled to an account and to redeem both mortgages as against the defendant Darling.

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I am asked to give an unqualified judgment for redemption, and leave the plaintiff to add the Perfect Brick and Tile Company and Wilder in the Master's office. These parties can hardly be regarded as subsequent incumbrancers, nor do I think it is a case in which I should direct that they be added under Rule 490—clearly not as to Wilder, at all events.

It is conceivable, though barely possible, that if the company had been a party defendant at the trial it could have shewn that, for some reason not disclosed, the plaintiff is not entitled to redeem. It is conceivable and remotely possible that if Wilder had been a party he could have shewn—though he probably would not have done so—that all necessary proceedings were taken under the power of sale in the Guess mortgage to make a good title. These are fundamental and initial questions, and their determination ought not, I think, to be relegated to the Master's office.

The trustees of the Toner estate are parties and retain a part of the Storrington lands; but, if their grantee is not to be disturbed, there is no object in disturbing them. It is not that I regard any of these parties, legally speaking, as purchasers without notice; it is that nothing should be presumed against absent parties, and the plaintiff's rights can be otherwise secured.

I infer from the evidence that Darling is a man of substance. There will be judgment declaring that as against him the plaintiff is entitled to redeem, and compelling him to account; and, as the plaintiff's right is to a reconveyance upon payment of the balance of the mortgage-moneys, if any, the defendant Darling must account upon the basis of the value of the lands at the date of writ—the date at which the plaintiff offered and became entitled to redeem and have a reconveyance. If the totals of the values plus the rents are greater than the rentals and the moneys obtained by sales, he will be charged with these sums; if otherwise, he will account according to the ordinary practice of the Court in mortgage actions.

I will delay the endorsement of the record for twenty days; and if, in the meantime, the defendant Darling puts himself in a position to reconvey, and gives notice of his readiness to do so, there will be judgment for redemption and an account and reconveyance in the usual terms; otherwise it will include as well

the special provisions above set out. In either event the plaintiff will have the costs of the action against all the defendants, as the defendants the Toners are not blameless in this matter. But, as it was mainly Darling who occasioned the trouble, the trustees of the Toner estate will have the right to recover from the defendant Darling any sum that they are compelled to pay the plaintiff for costs. I will make no order as to their costs of defence.

Further directions and the costs of the reference are reserved. It may not be necessary for the Toner estate to be represented upon the reference.

The defendant Darling appealed from the judgment of LENNOX, J.

March 24. The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, JJ.A.

J. D. Falconbridge and *J. A. Jackson*, for the appellant, argued that the plaintiff was barred by the Real Property Limitation Act, R.S.O. 1897, ch. 133. They referred to *Glass v. Freckleton* (1864), 10 Gr. 470; Halsbury's Laws of England, vol. 21, p. 149; 27 Cyc. 1852; *Faulds v. Harper*, 2 O.R. 405, 9 A.R. 537, 11 S.C.R. 639. The appellant relied on R.S.O. 1914, ch. 75, sec. 20, and contended that sec. 40 was not applicable.

A. B. Cunningham, for the plaintiff, respondent, referred to the *Faulds* case, 11 S.C.R. 639, *per* Henry, J., at p. 659; *Caldwell v. Hall*, 6 U.C.L.J.O.S. 141.

J. L. Whiting, K.C., for the defendants the Toners, respondents, was satisfied with the judgment of the learned trial Judge.

April 19. The judgment of the Court was delivered by MEREDITH, C.J.O.:—This is an appeal by the defendant Darling from the judgment, dated the 20th January, 1916, which was directed to be entered by Lennox, J., after the trial of the action before him, sitting without a jury, at Kingston, on the previous 8th October.

The respondent Smith is one of the children of Margaret Ann Smith, deceased, who in her lifetime was the owner of the lands in question, which may for convenience be referred to as the

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Kingston property and the Storrington property. She and her husband, on the 24th July, 1900, mortgaged the Kingston property to Sands S. Guess to secure \$400, and they on the same day mortgaged it to the appellant to secure \$726, and Guess's executor assigned the \$400 mortgage to the appellant. The appellant has also acquired the interests of four of the heirs at law of Mrs. Smith. The appellant sold the land under the power of sale contained in his mortgage to Lawrence Frey for \$750, and on the 29th April, 1910, entered into an agreement with Frey to convey the land to him on payment of the purchase-price. Frey sold his interest to Joseph E. Wilder, and the appellant on the 17th February, 1911, entered into an agreement with Wilder to sell to him for \$731.68. This agreement is still subsisting, and no conveyance has yet been made to Wilder.

The Storrington property was mortgaged by Smith and his wife, and Elizabeth Smith, to the executors of Benjamin Bailey on the 2nd December, 1895, for \$1,500, and the mortgage was assigned by them to the appellant on the 8th April, 1901. Before assigning the mortgage, the executors of Bailey had begun proceedings for foreclosure upon their mortgage, and these were continued by the appellant in the name of the executors, and resulted in a final order of foreclosure being obtained. Although Mrs. Smith had died pending the action, no notice was taken of this, and her heirs were not made parties, nor was an order to continue the proceedings against them obtained. The appellant, not knowing of this defect in the foreclosure proceedings, and assuming to be the owner of the land free from the equity of redemption, sold and conveyed it to Walter Toner on the 30th June, 1904, and Toner has since sold and conveyed a part of it to the Perfect Brick and Tile Company.

Toner is made a party defendant, but the Perfect Brick and Tile Company is not a party to the action.

The appellant sets up the Limitations Act as a bar to the action, and it is conceded that, unless the respondent Smith's right to redeem is saved by what is now sec. 40 of the Limitations Act, it is barred, but that, if that section applies to an action for redemption, he is entitled to redeem.

On the argument an arrangement was made between the parties as to the Kingston property; and it is therefore necessary to deal only with the Storrington property.

The question as to the application of the disability sections to an action for redemption is by no means free from difficulty, and the difficulty is increased by the conflict of judicial opinion as to it.

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The legislation in this Province has followed closely on the lines of Imperial legislation.

3 & 4 Wm. IV. ch. 27 (Imperial) is the first of the Acts to which reference need be made. By it the time was limited for making an entry or distress or bringing an action "to recover any land or rent:" sec. 2. By secs. 16 and 17, a longer period was allowed in case of disability arising from infancy, coverture, idiocy, lunacy, unsoundness of mind, or absence beyond seas; and sec. 28 limited the time for bringing a suit to redeem, the period for which was twenty years after the time when the mortgagee had obtained the possession or receipt of the profits of the mortgaged property, unless in the meantime there had been a written acknowledgment of the mortgagor's title or his right of redemption, and in that case within twenty years after the acknowledgment, or the last of the acknowledgments, if more than one.

Shortly after this Act came into force, attention was called by Lord St. Leonards in his work on real property, Sugden's Real Property Statutes, 1st ed., p. 114, to the omission from sec. 28 of any saving for disabilities. He there says: "There is, it should be observed, no savings (*sic*) for disabilities of the mortgagor or his heirs in regard to the bar created by section 28" (p. 118, 2nd ed.)

Mr. Fisher appears to have been of a different opinion. In the first edition of his work on mortgages, p. 95, para. 142, he refers to the passage I have just quoted, and says that "if the position of the clauses be alone considered there seems to be good reason for this conclusion, but whether it was intended, and whether Courts of Equity in construing the Act would feel bound to deprive the mortgagor and his heirs of this benefit, may be doubted. The only reason why they should be deprived of the advantage which it is clear they enjoyed when their rights were governed by analogy to the old Statute of Limitations seems to be that by the present statute the right to redeem is limited by a distinct and separate clause, whilst the remedies of mortgagees

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are affected only in common with the remedies of other persons who claim 'any land or rent in equity' and to whose rights the disability clause is generally applicable. But for this there were several reasons: the time of accruer of the right to sue, the nature of the acknowledgment, the person in whose favour and against whom the acknowledgment is to operate, the part of the estate which may be redeemed in certain cases, and the proportion of the mortgage-debt and interest necessary to be paid on such redemption, are all matters for which, as they affect the rights of the mortgagor, it was necessary or was thought fit to make special provisions, which were most conveniently contained in a separate clause. But this does not alter the fact that a redemption suit is a suit to recover 'land or rent in equity.' To such suits the disability clause, as well as those which relate to cases of express trusts and of fraud, are generally applicable, and it would be a singular and narrow construction of the Act to bind a mortgagor under disability now who was not so bound before the present statute, because it was found necessary to give a larger explanation of his other rights. The extension of the 16th to the 28th section appears by no means so strong a conclusion as the extension of the 25th (express trusts) to the 40th and 42nd, for in the former case both sections refer in effect to suits for the recovery of land, but in the latter, one contemplates the recovery of land and the other money and the interest of money charged on land."

This passage does not appear in the 6th edition, but the following takes its place: "The 28th section of the Act of 3 & 4 Wm. IV., which bars the right of redemption, and the 7th section of the Act of 1874, which corresponds to it, are not affected by the disability clause (s. 16) of the former Act; a redemption suit not being a suit to recover land within the meaning of the Act" (p. 724, para. 1412.)

The authorities given for this statement are Sugden's Real Property Statutes, p. 114; *Kinsman v. Rouse*, 17 Ch. D. 104; and *Forster v. Patterson*, 17 Ch. D. 132.

I have not found any English case in which the question arose before *Kinsman v. Rouse* (*supra*).

That case was decided by the Master of the Rolls (Jessel), and his decision did not depend upon the arrangement of the sections, or the order in which they appeared in the Act, but was

based upon the broad ground that an action for redemption was not, within the meaning of the Act, "an action to recover land."

In 1874, the Act reducing the period of twenty years allowed by 3 & 4 Wm. IV. ch. 27, to twelve years, was passed (37 & 38 Vict. ch. 57), in the preamble of which it is recited that "it is expedient further to limit the times within which actions or suits may be brought for the recovery of land or rent, and of charges thereon."

In this Act the arrangement of the sections is the same as in the earlier Act, sec. 5 corresponding with sec. 16, and sec. 7 to sec. 28.

The recital in the preamble would seem to indicate that the draftsman thought that an action to redeem was an action to recover land, otherwise one would have expected that the recital, which refers to charges, would also have referred to actions to redeem.

In *Forster v. Patterson* (*supra*) the question arose on the Act of 1874, and the same conclusion was reached by Bacon, V.-C., as was come to by the Master of the Rolls in *Kinsman v. Rouse* (*supra*), though the Vice-Chancellor laid stress "upon the order in which the clauses are arranged" (p. 135).

It is not surprising that the text-writers differ as to the question, though most of them state the law to be as it was held to be in the two cases to which reference has been made.

In *Banning on Limitation of Actions*, 3rd ed., p. 174, it is said that "under the 3 & 4 Wm. IV. ch. 27, as that statute has been construed by the Courts, the period of twenty years (now twelve years) is now absolute—and runs whether the mortgagor or the mortgagee is under disability or not, at the time when the right of action accrued — scil., at the time when the right of foreclosure or of redemption accrues, these being the rights against the land."

In the second edition (1892), pp. 187-8, the writer says, referring to the opinion of Lord St. Leonards, already quoted: "With the greatest deference to so high an authority it may be remarked that the correctness of this observation is now perhaps doubtful. And inasmuch as a redemption suit appears equally with a foreclosure suit to be a suit for the recovery of land within section 24 of the Act, which places suits in equity on the same footing with actions at law, it seems to follow that all the savings

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which are allowed in favour of other plaintiffs will (so far as applicable) be allowed a mortgagor plaintiff in a redemption suit. And it may be noticed that, according to the old law, a mortgagor had benefit of disability."

In Coote on Mortgages, 8th ed., pp. 774-5, it is said: "There is in the Acts now in force no express saving of disabilities of the mortgagor or his heirs in any distinct clause; they were saved under the old Statute of Limitations; but it has been held that section 16 of the Act of Wm. IV. as to disabilities does not apply to a mortgagor redeeming, inasmuch as an action for redemption is not an action to recover land for the purposes of the Statutes of Limitation."

In the following works it is stated that the disability section does not apply to suits to redeem: Dart on Vendors and Purchasers, 7th ed., p. 438 (note b); Williams' Real Property, 21st ed., p. 563; Darby and Bosanquet on Limitations, 2nd ed., pp. 469, 470; Halsbury's Laws of England, vol. 19, p. 150, para. 302.

I pass now to the consideration of the Provincial Acts and the decisions upon them.

The Legislature of Upper Canada, in the year after 3 & 4 Wm. IV. ch. 27 was enacted, passed an Act intituled "An Act to amend the Law respecting Real Property, and to render the proceedings for recovering possession thereof in certain cases, less difficult and expensive" (4 Wm. IV. ch. 1). Sections 16 to 45 (inclusive) are the same as the sections of the Imperial Act, though the numbers of them are not the same. The order in which the sections are arranged is the same, and all the provisions of the Imperial Act, except those which deal with ecclesiastical matters and estates tail, are embodied in the Provincial Act.

This Act was consolidated in 1859, and appears as ch. 88 in the Consolidated Statutes of that year. With it are consolidated the provisions of 10 & 11 Vict. ch. 5, secs. 1 to 8 inclusive, which relate to prescription in the case of easements, of secs. 9, 10, and 11 of the same Act, which relate to estates tail, of 16 Vict. ch. 121, sec. 1, which relates to the making of entries and bringing of actions by mortgagees, and of 7 Wm. IV. ch. 2, sec. 11 (dormant equities).

In this chapter the sections are arranged under headings, and changes are made in the previous order of some of the sections.

Section 28 of the Act of 1834, which corresponds to sec. 16 of the Imperial Act, became sec. 45, and appears under the heading "Disabilities and Exceptions" and the sub-heading "In cases of land or rent;" and sec. 36, which corresponded with sec. 28 of the Imperial Act, became secs. 21, 22, and 23.

The disability section (45) begins with the words: "If at the time at which the right of any person to make an entry or distress, or to bring an action to recover any land or rent, shall have first accrued, as hereinbefore mentioned."

It should be noted here that sec. 25 (a consolidation of part of sec. 1 of 16 Vict. ch. 121) provides that "any person entitled to or claiming under a mortgage of land, may make an entry or bring an action at law or suit in equity to recover such land, at any time within twenty years next after the last payment of any part of the principal money or interest secured by such mortgage, although more than twenty years may have elapsed since the time at which the right to make such entry, or bring such action or suit in equity, shall have first accrued."

I refer to this section because it may be thought that the language indicates that it was thought that a suit for foreclosure is an action to recover land within the meaning of the Act. However that may be, the rearrangement of the sections in the Consolidated Statute to which I have referred was obviously due to the plan which was adopted by the Commissioners for the revisions of the statutes of arranging the sections under appropriate headings, and not with the object of making any change in the existing law.

The next legislation was the statute of 1874 (38 Vict. ch. 16), the purpose of which was similar to that of the Imperial Act of the same year (37 & 38 Vict. ch. 57).

It is necessary to refer to the preamble of this Act, for its recitals were relied on in the Court of Appeal in *Faulds v. Harper*, 9 A.R. 537, in coming to the conclusion to which a majority of the members of the Court came, that the disability sections do not apply to actions for redemption.

The recital of the preamble is: "Whereas it is expedient to lessen the time for making entries and distresses, and for bringing actions and suits to recover land or rent, in certain cases from forty to twenty years, and in certain other cases from twenty to

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ten years, and in certain other cases from ten to five years, and also to lessen the time for redemption by mortgagors, and for recovery of dower, and of money charged on lands or on rent, and of legacies, and also to provide for cases of money and legacies charged on land or on rent secured by express trust, according to the provisions hereinafter contained respectively relating thereto."

In this Act the order of the sections of the Imperial Act and of the Act of 1834 is followed, sec. 1 containing the general provisions as to the time within which an entry or distress may be made or an action or suit to recover land or rent may be brought, secs. 5 and 6 the disability sections, and secs. 8, 9, and 10 the sections relating to actions or suits to redeem.

Before referring further to the case of *Faulds v. Harper*, reference should be made to *Caldwell v. Hall*, which is reported in (1860) 6 U.C.L.J. 141, and, *sub nom. Hall v. Caldwell* (1861), 7 U.C.L.J. 42, 8 U.C.L.J. 93. The suit was for redemption, brought by the heir at law of the mortgagor, and the question of the applicability of the disability sections of the Limitations Act then in force (C.S.U.C. ch. 88) came up on demurrer, though there were other grounds assigned for it. The judgment of the Court of Chancery (6 U.C.L.J. 141) was delivered by Esten, V.-C. The demurrer was overruled, the reason, as to the question of the Statute of Limitations, being that it obviously interposed no bar, "possession not having been taken until 1839, less than twenty years before the commencement of the suit."

The defendants appealed to the Court of Error and Appeal, the Judges being Sir John Robinson, C.J., the Honourable W. H. Draper, C.J., Esten, V.-C., Burns, J., Spragge, V.-C., Richards, J., and Hagarty, J. The case in appeal is reported twice, first in 7 U.C.L.J. 42, and afterwards in 8 U.C.L.J. 93. In the earlier report the opinions of the Chief Justice of the Court and Esten, V.-C., appear, and in the later report only the opinion of the Chief Justice, which is reported at much greater length than in 7 U.C.L.J. The Chief Justice, according to the earlier report, was of opinion that, assuming that every statement in the bill must be taken against the pleader, it was sufficiently alleged that the mortgagee had been in possession for more than twenty years, but that the right to redeem was not barred, because the plaintiff was entitled

to claim the benefit of the disabilities clause of the Act, and that "the object of the mortgage clause was to settle the law as to the right of the mortgagor to redeem and not to limit him in any other way, and therefore not to deprive him of the advantages of disabilities which he enjoyed before." The reasons for this view are more elaborated in the report in 8 U.C.L.J. Esten, V.-C., referred to the observations of Lord St. Leonards and to Mr. Fisher's criticism of them, and expressed the opinion that "the clause in the Statute of Limitations providing for disabilities must be held to apply to redemption of mortgages, as well as to actions for the recovery of land," and he thought that "the Legislature did not intend to deprive the mortgagor and his heirs of that benefit."

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The question next came up in *Faulds v. Harper*, 2 O.R. 405, 9 A.R. 537, 11 S.C.R. 639. The case was ultimately decided in favour of the plaintiffs, who were heirs of the mortgagor, upon the ground that the Statute of Limitations did not apply because the possession was not as mortgagee but as trustee. The case was tried before Blake, V.-C., who made a decree declaring the three eldest of the plaintiffs barred by the Statute of Limitations, and dismissing the bill so far as they were concerned, also declaring that the two younger plaintiffs were not entitled to redeem the land, but were each entitled to one-fifth of the proceeds of the sale, subject to what was due on the mortgage. The case was reheard and twice argued—the second time before Proudfoot and Ferguson, JJ. *Kinsman v. Rouse* (*supra*), *Forster v. Patterson* (*supra*), and the *Caldwell* case (*supra*), were cited, and the latter case was followed in preference to the English cases, both Judges holding that the *Caldwell* case was binding on the Court, and Proudfoot, J., saying that it enunciated the true construction of the statute. It was also decided that the equity of redemption was "an entire whole" (2 O.R. at p. 411), and that, "while any of the owners is entitled to sue for redemption, it enures for the benefit of all" (p. 412); and it was adjudged that all the plaintiffs and their mother were entitled to the whole proceeds of the sale.

It should have been mentioned that the mortgagee had put the mortgaged property up for sale under a power of sale in his mortgage, and that it was bought in for him, but was subsequently sold to a *bonâ fide* purchaser for value without notice, who was entitled to hold free from any right of redemption.

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The Court of Appeal consisted of Spragge, C.J.O., Burton, Patterson, and Morrison, J.J.A., and its conclusion was that the disabilities sections of the Act did not apply to suits to redeem. The Chief Justice dissented, basing his opinion upon the ground upon which the case was ultimately decided, and expressing no opinion upon the point upon which it was decided in the Court of Appeal.

Burton, J.A. (9 A.R. at pp. 548, 549), relied upon the preamble of the Act of 1874, which, he said, drew a distinction between "an ordinary suit for the recovery of land and a suit to redeem." He also relied upon the provision of sec. 16 of that Act, which provided that the Act should "come into force on the 1st July, 1877, as respects any person who at the time of the passing of the Act resided out of the Province, and who was entitled to make an entry or distress, or to bring any action or suit, to recover any land or rent, or who was a mortgagor or person entitled to redeem within the meaning of the 21st and three subsequent sections of the Consolidated Statute." He called attention to "the marked distinction throughout the statute between ordinary actions, or suits to recover land at law, or in equity, and a suit to redeem," and the fact that sec. 5 "grants the extension in the cases specified notwithstanding that the period of ten years *hereinbefore mentioned*, that is, in the four previous sections limited, not by *this Act limited*, had expired." He also (p. 550) quoted the observations of Lord St. Leonards to which I have referred, and said that if he was "wrong in holding that under the words of our statute an action to redeem is not, properly speaking, 'an action to recover land' within the previous section of the statute," he was "content to err in such good company as the late Master of the Rolls, who so held in *Kinsman v. Rouse*" (*supra*), "where he held that those sections evidently referred to cases of ordinary ownership, where the rightful owner of land has been dispossessed, and that it was not intended to put the rights of the mortgagee upon the same footing as the rights of persons claiming under an ordinary dispossession of land."

Patterson, J.A., was of the same opinion, and, referring (p. 560) to R.S.O. 1877, ch. 168, and the words "as aforesaid" in sec. 43, pointed out that those words were not in sec. 5 of the Act of 1874, which, by sec. 16 of that Act, was substituted for sec. 45 of the Consolidated Statute. These words, he said, were

not in the roll mentioned in 40 Vict. ch. 7, nor among the amendments of that roll authorised by that Act. He was, however, of opinion that they effected no change in the law as enacted by the Act of 1874, because "the Revised Statutes are not held to operate as new laws, but are to be construed and have effect as a consolidation, and as declaratory of the law as contained in the statutes for which they are substituted . . . The Court could properly look at the original statute as a guide to the interpretation of the law as found in the Consolidated Act."

Farquharson v. Imperial Oil Co. (1899), 30 S.C.R. 188, affords an illustration of the extent to which this rule of construction is carried. The Court there, for the purpose of construing sec. 5 of ch. 120 of R.S.O. 1887, went back to ch. 47 of the Consolidated Statutes of Upper Canada, although there had been an intervening revision.

The view of the Court of Appeal was that, in the circumstances, *Caldwell v. Hall* was not a binding authority and ought not to be followed, and it was not followed.

In the Supreme Court, as I have said, it was decided that the Limitations Act did not apply, and it was therefore unnecessary to decide the question as to the applicability of the disability sections of it to suits to redeem. Opinions as to it were, however, expressed by Strong and Henry, JJ.

The view of Strong, J. (11 S.C.R. at pp. 655, 656), was that if he had to choose between the decisions in *Caldwell v. Hall* and those in *Kinsman v. Rouse* and *Forster v. Patterson*, he "should certainly have agreed with the learned Judges of the Divisional Court" (i. e., Proudfoot and Ferguson, JJ.); "for the reason that since the two cases in 17 Chancery Division were decided the House of Lords has held in *Pugh v. Heath*, 7 App. Cas. 235, that a foreclosure suit is an action for the recovery of land. This being so, it follows *â fortiori* that a redemption suit is also an action or suit for the recovery of land. And it is impossible, without doing violence to the words of the statute, to hold that the saving of disabilities does not apply to any action or suit, as well in equity as at law, for the recovery of land."

Henry, J., was of the same opinion, for reasons which he stated, and illustrated the injustice of a different construction of the statute by a supposititious case which he said was not unlikely to occur (p. 662): "A property is mortgaged for an amount equal

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to a small percentage of its value by a man who at his death leaves two or three infants, not one of whom are (*sic*) over five years of age at the time the mortgagee enters into possession, as he is entitled to do—he holds that possession for ten years, and the right to redeem of the infants, not one of whom is then over sixteen or seventeen years, is forever barred.”

A short reference should now be made to the course of the legislation since the revision of 1877. In the Revised Statutes of 1887, ch. 108 became ch. 111, practically without change, except that secs. 4 to 15 inclusive are headed “Land or Rent,” and in sec. 43 the words “as in sections 4, 5, and 6 mentioned” are substituted for the words “as aforesaid.”

In the revision of 1897, ch. 111 became, without any change, ch. 133.

In 1910, with a view to the revision which is now R.S.O. 1914, 10 Edw. VII. ch. 34 was enacted. In this Act all the Limitation Acts are brought together. Part I. relates to real property, and the only change made is in sec. 40 (sec. 43 of ch. 111, R.S.O. 1887) by the substitution for the words “as in sections 4, 5, and 6 mentioned,” the words “as herein mentioned.”

In the Revised Statutes of 1914 this Act forms ch. 75, and the heading “Land or Rent” does not appear.

It is not surprising that Canadian text-writers differ, as do the English. The authors of Bell and Dunn on Mortgages, pp. 382-3, adopt the view taken by Strong and Henry, J.J., in *Faulds v. Harper* (*supra*); and the author of Leith’s Blackstone the opposite: 2nd ed., p. 444.

Although the arguments in favour of the view that the disability sections are applicable are weighty, they are not, I think, conclusive. As was argued by Mr. Fisher, it may be said that it was unlikely that the Legislature intended to deprive mortgagors of the benefit of disabilities which they enjoyed before the Act of 1833 was passed; and, as Henry, J., pointed out in *Faulds v. Harper*, there are cases in which, if there be no saving in case of disabilities, injustice would be done. It is true also that a suit to redeem has been decided to be a suit to recover land.

The time for bringing actions of dower was, by 32 Vict. ch. 7, sec. 22, limited to twenty years from the death of the husband. That section was repealed by sec. 14 of the Act of 1874, and a new section limiting the time to ten years was substituted for it;

and, by sec. 14' (now sec. 26 of R.S.O. 1914, ch. 75), it is expressly provided that the section shall apply notwithstanding any disability of the demandant or of any person claiming under her. This shews that there were some cases to which it was thought that the disability sections should not apply; and, if they ought not to apply to a dowress, why may not the Legislature have thought that they should not also apply to mortgagors seeking to redeem? The words "as herein mentioned" in sec. 40 (i.e., of ch. 75 of the Revised Statutes 1914), it will be observed, apply to the time at which "the right of any person to make an entry or distress, or to bring an action to recover any land or rent, *first accrues*." That is a matter dealt with by sec. 6, which defines the time at which the right first accrues in various cases, none of them being the case of a mortgagor seeking to redeem; and it is, I think, to these provisions that sec. 40 refers. The mortgage sections do not define the time at which the right to redeem shall be deemed to have *first accrued*, but the provision is that the action shall not be brought but within ten years next after the time at which the mortgagee obtained possession or receipt of the profits of the land. In addition to this, the words used in sec. 40 are the same that are used in sec. 5, and the words "as herein mentioned" are, I think, the equivalent of the words of the section in the Revised Statutes of 1887 and 1897, which correspond to sec. 40, "as in sections 4, 5, and 6 mentioned;" and, therefore, while it is true that, unexplained by the context, "an action to redeem" is "an action to recover land," the other provisions of the Act and the context indicate that it was not in that sense that the words were used, but in the sense in which they were interpreted in the two English cases and by the Court of Appeal in *Faulds v. Harper*.

Upon the whole, though necessarily not without some doubt owing to the conflict of judicial and other opinion to which I have referred, my conclusion is, if the question is *res integra*, that the disability sections do not apply to actions to redeem.

I am, however, of opinion that we ought, if indeed we are not bound, to follow the decision of the Court of Appeal in *Faulds v. Harper*. It was a decision on the very question we are now called upon to determine. The judgment of the Supreme Court of Canada, though it reversed the judgment of the Court of Appeal, proceeded on an entirely different ground from that upon which

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the case was decided in the Court below, and the expressions of opinion of Strong and Henry, JJ., as to the application of the disability clauses, were only *obiter*.

I would, for these reasons, reverse the judgment and dismiss the action as to the Storrington lands, but I would leave each party to bear his own costs of the action and of the appeal as far as these lands are concerned. The conflict of opinion as to the meaning of sec. 40, and the consequent uncertainty of the law as to the question we have had to determine, I think warrant that disposition of the question of costs being made.

Appeal allowed.

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[APPELLATE DIVISION.]

MCLEAN v. WILSON.

Title to Land—Strip between Road Allowance and Lake—Evidence—Survey—Trespasser—Possession—Limitations Act—Erection of Building—Right Acquired to Part of Land Occupied by, only—Easement—Prescription—Way to Building from Lake-shore—Way from Side Road.

The defendant, a fisherman, in 1895 erected a shack upon a small piece of land lying between a road allowance and Lake Huron, and made use of it at times until 1915, when the plaintiff brought this action to recover possession of it, alleging that it formed part of lot 43 in the 9th concession of the township of Sarnia, of which lot he was admittedly the owner:—

Held, upon evidence relating to the original survey of the township of Sarnia in 1829, that the lots in the 9th concession extended to the lake, and that the plaintiff had made out his paper title to the *locus in quo*.

Held, also, that the defendant failed to shew a possession of any part of the land of which possession was claimed, except that part of it which was occupied by the original shack which he built, sufficient to extinguish the title of the plaintiff. The land was not enclosed with a fence; and, apart from the occupation of the shack, the defendant went upon the land only for a few days in the spring or autumn, when he was engaged in fishing. His possession was not actual, continuous, and visible; and indeed was not a possession at all—his acts were but a series of successive trespasses with long periods of time between them—not the acts of an owner, but acts done in the exercise of the supposed right of a fisherman to utilise the beach for fishing operations.

Piper v. Stevenson (1913), 28 O.L.R. 379, *Nattress v. Goodchild* (1914), 6 O.W.N. 156, 482, 24 O.W.R. 184, 859, and *Cowley v. Simpson* (1914), 31 O.L.R. 200, distinguished.

Held, also, that the defendant had not established a right by prescription to pass and repass to and from the shack to the lake and over the strip of land lying between the road allowance and the water's edge in order to reach a side road—the testimony of the defendant shewing that there was no one way by which he came and went, but that he did so at one time by one route and at other times by other routes.

Regina v. Plunkett (1862), 21 U.C.R. 536, and *Regina v. Ouellette* (1865), 15 U.C.C.P. 260, in regard to the user sufficient to shew dedication, applied.

THIS action was brought in the County Court of the County of Lambton, and was tried by the Senior Judge of that Court, without a jury.

The plaintiff alleged that he was the owner of lot 43 in the 9th concession of the township of Sarnia, and that the defendant had trespassed thereon and wrongfully erected thereon a house or shack for fishing purposes, a stable for his horses, and a shed for his boats, his occupation being that of a fisherman.

The defendant denied generally the allegations of the plaintiff, and said that from 1895 to 1915 he was a duly licensed fisherman. He admitted that he built a shack near the lake-shore; he said, however, that it was not upon, but in front of, the plaintiff's land. The defendant further alleged that he had had over twenty years' continuous, peaceable, and undisturbed possession of the land on which the shack was erected, and a right of way thereto from the water's edge, and for over twenty years had had a right of way from the side road ("Modeland's") to the shack. The defendant also said that he had taken down and removed the boat-shed and the stable referred to by the plaintiff. And, without admitting any liability, the defendant paid into Court \$15 in full of any damage caused to the plaintiff by reason of the erection of any building or of any acts of trespass.

The learned County Court Judge (7th February, 1916) gave judgment for the plaintiff. In his written reasons, he set out the facts and discussed the law. His conclusion upon the first question raised by the defence was, that the plaintiff was the owner of the land to the water's edge.

The learned Judge's reasons in regard to the alternative defence of the Limitations Act were as follows:—

MACWATT, Co. C.J.:—The defendant claims title under the Statute of Limitations to: (1) the land on which the shack is erected; (2) a right of way from the water's edge to the shack; (3) a right of way from the shack to Modeland's side road.

As to (1), the evidence is, that for more than ten years there has been a shack erected where it now is; that in November, 1913, it was partly destroyed by a storm, but rebuilt on the same site, only larger, and consequently more land was taken in, during the year 1914. I am of opinion that the defendant has

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proven a statutory title by possession to the land on which the original shack was erected, but not to the full amount of land covered by the new shack, from which he must forthwith remove that part of the building.

The evidence shews that the location of the boat and stakes during the twenty years was not always in the same place from year to year.

As to a fisherman's possession for part of the year only, *Nattress v. Goodchild* (1914), 6 O.W.N. 156, following *Piper v. Stevenson* (1913), 28 O.L.R. 379, seems conclusive, as, while the Appellate Division (*Nattress v. Goodchild* (1914), 6 O.W.N. 482) ordered a new trial, I am informed by counsel that it was on the question of the wrongful admission of evidence, and does not affect the principle of the decision.

As to (2), the right of way from the water's edge to the shack, the evidence is anything but conclusive. When one claims title under the statute, the proof must be conclusive; no uncertainty should be admitted when it is a question of a squatter endeavouring to obtain the property of another, without leave, license, or payment.

In *Campeau v. May* (1911), 2 O.W.N. 1420, 1421, Middleton, J., says: "The use made of this land was not continuous but occasional. It may be said this makes it very hard to acquire a possessory title. I think the rule would be quite different if the statute was being invoked in aid of a defective title, but I can see nothing in the policy of the law which demands that it should be made easy to steal land, or any hardship which requires an exception to the general rule that the way of the transgressor is hard."

The only evidence of possession for twenty years is that of the defendant, and he *thinks* he has been there since the spring of 1895. As the writ was issued on the 11th June, 1915, if he commenced operations in the spring of 1895, say April, he would be entitled to succeed, if this were definitely proven. But not if the law is as laid down in *Armour on Real Property*, p. 470, where he says: "It (prescription) must not have been in the absence or ignorance of the parties interested in opposing the claim during the period it was exercised." If this be correct, the plaintiff, according to the evidence, knew nothing of the defendant

using a right of way from the water's edge to the shack till at least almost the 1st July, 1895, when he removed to his summer cottage for the season.

But the defendant's cross-examination shews that he or his men did not use the same strip of beach continuously in going to or returning from the water's edge; they "did not always follow the same track," but "made our own road each time we came in."

In the face of that, I cannot find that the defendant has had a right of way from the shack to the water's edge for twenty years, the requisite time.

As to a right of way of necessity, while counsel did not refer to this in argument, I am of opinion that one securing a small parcel of land contained in a larger one should not get more than the law absolutely gives him. See *Armour on Titles*, 3rd ed., p. 300, citing *Wilkes v. Greenway* (1890), 6 Times L.R. 449, a case in which such a claim was made on behalf of the owner of a land-locked parcel, and dismissed. Mr. Armour quotes from the judgment of Lord Esher, M.R., the following passage: "The statute does not expressly convey any title to the possessor. Its provisions are negative only. We cannot import into such negative provisions doctrines of implication that would naturally arise where title is created either by express grant or by statutory enactment. The title to the premises is not a title by grant. The doctrine of a way of necessity is only applied to a title by grant, personal or Parliamentary."

See also *McLaren v. Strachan* (1891), the judgment of Boyd, C., reported in 23 O.R. in a note on pp. 120 to 122, in which he said (p. 121): "The possession is that of a squatter, and it should be strictly limited to a *possessio pedis*." And he said (p. 122): "A way of necessity, which would arise by implication upon a purchase, should not be attached by construction of law to a squatter's appropriation of another's property, though it may be dignified by the name of Parliamentary conveyance."

See also Halsbury, vol. 11, para. 566, pp. 289 and 290.

As to (3), the right of way from Modeland's side road to the shack, the evidence does not satisfy me that the defendant has had this prescriptive right for a period of twenty years, and I so find in the plaintiff's favour.

There will be judgment for the plaintiff for possession of the land in the statement of claim mentioned, except the portion on

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which the original shack was erected, which is adjudged to be the property of the defendant. The defendant to remove forthwith any part of the shack or shacks outside the land on which the original shack stood.

The defendant and his servants are perpetually restrained from entering upon any other part of the land of the plaintiff.

I assess the damages for the use of the land covered by the part of the shack recently built, and not covered by the old shack, and for the various trespasses, at the sum paid into Court, namely, \$15, and I direct the defendant to pay to the plaintiff the costs.

The defendant appealed from the judgment of the learned County Court Judge.

April 3. The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, JJ.A.

D. L. McCarthy, K.C., for the appellant, argued that the respondent had not proved title to the land which lies between the road allowance and the lake. This piece of land did not form part of lot 43, which was the only land which passed to the respondent under the conveyance to him. Lot 43 ends on the southerly side of the allowance for road on the summit of the bank of the lake. The surveyor's field-notes and report shew that the strip of land between the road allowance and the lake was not included in the 9th concession. He also submitted that the appellant had established his possessory title to the land on which his shack had been erected, and a right of way thereto from the water's edge, and a right of way from Modeland's side road to the shack. On the question of possession, he referred to *Nattress v. Goodchild*, 6 O.W.N. 156, 482; *Piper v. Stevenson*, 28 O.L.R. 379.

W. N. Tilley, K.C., for the plaintiff, respondent, contended that the strip of land in question formed part of lot 43, which extended to the water's edge, and that the respondent's title thereto was clear. As to the appellant's claim to a possessory title, his possession had never been continuous. In fact there had been no possession by him, but only isolated acts of trespass, which gave him no rights: *Regina v. Davy* (1900), 27 A.R. 508; *Soper v. City of Windsor* (1914), 32 O.L.R. 352; *Cowley v. Simpson* (1914), 31 O.L.R. 200. As to the appellant's claim of a prescriptive right to pass and repass from the shack to the lake, the

contention was untenable, because the evidence shewed that he did not always go or come the same way, but took different routes at different times.

McCarthy, in reply.

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April 19. The judgment of the Court was delivered by MEREDITH, C.J.O.:—This is an appeal by the defendant from the judgment of the County Court of the County of Lambton, dated the 7th February, 1916, which was directed to be entered by the Senior Judge of that Court, after the trial of the action before him, sitting without a jury on the 19th day of the previous month of January.

The respondent brings the action to recover possession of a small piece of land bordering on Lake Huron, which land, as he alleges, forms part of lot No. 43 in the 9th concession of the township of Sarnia, of which lot he is admittedly the owner.

The appellant, by his statement of defence, besides putting in issue the respondent's title to the *locus in quo*, sets up possession of it in himself for a period sufficient under the Limitations Act to extinguish the respondent's title.

The respondent derives title to lot No. 43 under a conveyance to him from Cynthia Fuller, dated the 17th June, 1881. Cynthia Fuller derived her title from Thomas C. Street, the devisee in trust of Samuel Street, to whom this lot, with other lands, was granted by letters patent dated the 18th August, 1841.

In the letters patent the lots granted are designated by numbers and are also described by metes and bounds; and, according to the metes and bounds, lot 43 is bounded on the north by the water's edge of Lake Huron. In the subsequent conveyances, lot No. 43 is described by its number only.

The contention of the appellant is, that lot No. 43 does not extend from the north to the water's edge of Lake Huron, but is bounded on the north by a road allowance laid out in the original survey of the township on the bank of the lake; and that, if the land to the north of the road allowance passed by the letters patent to Samuel Street, it did not pass as being part of lot No. 43; and that, inasmuch as in the subsequent conveyances what was conveyed was lot No. 43 only, the respondent has not proved title to the land which lies between the road allowance and the lake.

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The first question to be determined is, whether or not this piece of land forms part of lot No. 43. If it does, the respondent's title is made out.

The original survey of the township of Sarnia was made in 1829, by a Provincial land surveyor named Roswell Mount, under instructions from the Surveyor-General, dated the 8th April, 1829.

The diagram which accompanied the instructions cannot be found; and, therefore, the result of the survey must be gathered from the instructions, the report of the surveyor, which is dated the 30th January, 1830, the plan which he returned to the Surveyor-General, and the field-notes of the survey.

Mr. McCarthy argued that these shew that the strip of land between the road allowance and the lake was not included in the 9th concession, but I do not think that that is the proper conclusion.

By his instructions the surveyor was directed, "with respect to the lots bordering on the lake-shore and on the river St. Clair," to observe "that it is required that they shall be posted on the bank with an allowance for road in front on the said bank;" and this he is directed to do "by subdividing the distance between the proof lines (excepting the intermediate side road) into eighteen equal parts, regulating their depths according to the front so as to give to each lot one hundred acres."

In his report Mr. Mount says: "With respect to the lots bordering on the lake-shore and on the river St. Clair, I have posted them on the bank with an allowance of one chain for a road in front along the said bank. This I have done by subdividing the distance between the proof lines (except the intermediate side road) into eighteen equal parts, and those between the concessions into twelve equal parts, regulating their depth according to the front so as to give each lot one hundred acres."

The field-notes shew that the road allowance followed the sinuosities of the shore of the lake, and the plan indicates that the lots in the 9th concession ran to the lake, with the road allowance marked by a red line crossing it.

It is plain, therefore, I think, that the instructions indicate that the lots in the 9th concession were to extend to the lake. They were to be "lots bordering on the lake shore," and they are

so called in the report of the surveyor. Then, as I have said, the plan shews the lots as bounded by the lake. The object of planting the posts on the bank was not to mark the northerly boundary of the lots, but to indicate the width of them.

Besides all this, if Mr. McCarthy's argument were to prevail, the strip of land between the road allowance and the water's edge of the lake would not have formed any part of the township of Sarnia, but would have been unsurveyed land.

It is manifest also that the Surveyor-General read the report and the plan as I read them.

For these reasons, I am of opinion that the respondent made out his paper title to the *locus in quo*.

I am also of opinion that the appellant failed to shew a possession of any part of the land of which possession is claimed, except that part of it which was occupied by the original shack or hut which he built, sufficient to extinguish the title of the respondent. Such use as he made of the strip of land between the road allowance and the water's edge of the lake was as a mere trespasser; and, being but a trespasser, it was necessary for him to shew pedal possession. Apart from the occupation of the site of the shack or hut, he went upon the land only for a few days in the spring or autumn, when he was engaged in fishing, and at all other times the true owner was, in the eye of the law, in possession. It is well settled that possession, in order to extinguish the title of the owner, must be actual, continuous, and visible. The appellant's possession was not of that character, and indeed was not a possession at all, but his acts were but a series of successive trespasses with long periods of time between them.

The case at bar is distinguishable from *Piper v. Stevenson*, 28 O.L.R. 379. In that case, the land in question had been fenced, and the plaintiff had done everything to it that an owner intending to possess and cultivate would have done. In the case at bar, the land was not enclosed with a fence, and the acts of the appellant were not such as an owner would have done, but they were done in the exercise of the right which, the appellant assumed, he as a fisherman possessed, to utilise the beach for the purposes incidental to the carrying on of his fishing operations.

Neither *Nattress v. Goodchild*, 24 O.W.R. 184, 859, 6 O.W.N. 156, 482, nor *Cowley v. Simpson*, 31 O.L.R. 200, helps the appellant. In the former case, the possession of the defendant

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was very different from that of the appellant in this case, and there was the additional fact that the defendant had excluded trespassers from the land; and in *Cowley v. Simpson* all that the defendant succeeded as to was the land which he had enclosed with a fence.

It was argued by Mr. McCarthy that, if the appellant had not succeeded in making out his defence under the Limitations Act, by possession for ten years, except as to the land on which the original shack stood, he had at all events established a right by prescription to an easement in the nature of a right to pass and repass to and from the shack to the lake and over the strip of land lying between the road allowance and the water's edge in order to reach the side road.

In my opinion, the learned Judge of the County Court rightly decided against this contention. The testimony of the appellant shews that there was no one way by which he came and went, but that he did so at one time by one route and at other times by other routes. The principle which is applied in determining whether a highway has been established by dedication is, I think, applicable; and the cases of *Regina v. Plunkett* (1862), 21 U.C.R. 536, and *Regina v. Ouellette* (1865), 15 U.C.C.P. 260, established that a similar user to that of the appellant is not sufficient to shew dedication.

For this reason, as well as those upon which the conclusion of the learned Judge of the County Court was based, I am of opinion that the prescriptive right claimed by the appellant was not established.

The judgment as entered does not define the part of the lot as to which the appellant succeeded. This may occasion disputes in the future; and, if the appellant desires it, there should be a reference to ascertain and fix its boundaries, unless the parties agree as to the proper description of it, and in that case the judgment may be amended by inserting in it the description.

Subject to this variation, I would affirm the judgment and dismiss the appeal with costs.

Appeal dismissed.

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Railway—Damage to Land from Closing of Street in City—Elevation of Tracks—Order of Board of Railway Commissioners—Initiative—Jurisdiction—Elimination of Highway Crossings at Grade—Railway Act, R.S.C. 1906, ch. 37, sec. 238 (8 & 9 Edw. VII. ch. 32, sec. 5)—Municipal By-law—Remedy for Injurious Affection of Property—Compensation—Arbitration under Statute.

Section 238 of the Dominion Railway Act, R.S.C. 1906, ch. 37, as enacted by the amending Act 8 & 9 Edw. VII, ch. 32, sec. 5, deals with proceedings *in invitum* of a railway company; it was passed to facilitate the elimination or diminishing of grade crossings; in furtherance of this object, it empowers the Board of Railway Commissioners to act upon its own motion; and it confers authority upon the Board to order that part of a highway be closed, or at all events to require the proper municipal body to close it.

The plaintiff, the owner of land fronting on a street in the city of Toronto, brought this action to recover damages for the alleged wrongful interference by the defendants with the grade of the street, for closing up a part of it lying to the north of his land, and for injury to his house by the additional vibration occasioned by the running of trains on tracks elevated for the purpose of doing away with grade crossings; and the defendants justified under an order of the Board approving a plan for the elevation of the tracks, which shewed the crossing at the street referred to, the grade of the track there, and that part of that street was to be closed. The municipal council passed a by-law closing the part of the street referred to, and the tracks were elevated in pursuance of the order:—

Held, that the Board, in making the order, was acting upon its own motion and within its jurisdiction; that the acts of which the plaintiff complained were lawfully done in the execution of the order; and that the plaintiff had no right of action; his remedy was to seek such compensation as he could obtain by arbitration proceedings under the Railway Act for the injurious affection of his property by the closing of part of the highway and for any injury sustained by the elevation of the tracks.

Corporation of Parkdale v. West (1887), 12 App. Cas. 602, distinguished.

Judgment of FALCONBRIDGE, C.J.K.B., reversed.

THE plaintiff, the owner of part of lot 2 in block B. on the west side of Albany avenue, a public street in the city of Toronto, brought this action against the Canadian Pacific Railway Company and the Canadian Northern Ontario Railway Company to recover damages for the alleged wrongful interference by the defendants with the grade of the street, for closing up that part of the street lying to the north of his land, and for the injury to his house by the additional vibration from the running of trains on the tracks of the defendants, which had been elevated; or, in the alternative, for a mandatory order requiring the defendants to give the necessary notices and take proceedings under the Railway Act, R.S.C. 1906, ch. 37, to provide compensation for the loss and injury sustained by the plaintiff.

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January 31. The action was tried by FALCONBRIDGE, C.J. K.B., without a jury, at Toronto.
G. H. Watson, K.C., for the plaintiff.
W. N. Tilley, K.C., for the defendants.

February 4. FALCONBRIDGE, C.J.K.B.:—This is at most a comparatively trivial matter, and I am not going, if I can help it, after parties have come down to issue and trial, to send the plaintiff to another forum. I think that I am properly seized of the case, and I rule against the defendants' contentions on that point.

The defendants are admittedly liable in some tribunal for some amount—the question is, for how much? Two of the plaintiff's experts put his damage at \$1,000 and \$1,025 respectively. The defendants' two experts (and they are among the best-known in the community) say he suffers practically no damage whatever. The property is residential, not of a very high class, say the 4th or 5th.

Sitting as a jurymen, I am probably giving the plaintiff at least all that he is entitled to, if not more, when I strike a rough average and award him \$525.

I am not much impressed with the vibration theory as an element of damage. I cannot see how there can be more vibration from a train running over a well-built embankment, seven or eight feet high, than from one running over a level crossing. However, to prevent all question hereafter, I award the plaintiff \$25 on this head.

Judgment for the plaintiff for \$550 and costs. The defendants the Canadian Pacific Railway Company undertaking to hold the defendants the Canadian Northern Ontario Railway Company indemnified, judgment will go against both defendants.

The defendants appealed from the judgment of FALCONBRIDGE, C.J.K.B.

April 3 and 4. The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, JJ.A.

Angus MacMurchy, K.C., and *W. N. Tilley*, K.C., for the appellants, argued that by sec. 238 of the Railway Act of Canada,

as enacted by 8 & 9 Edw. VII. ch. 32, sec. 5, authority was conferred upon the Board of Railway Commissioners to order that part of a highway be closed, or at least to require the proper municipal authorities to close it: *United Buildings Corporation Limited v. City of Vancouver*, [1915] A.C. 345; *Grand Trunk Pacific R.W. Co. v. Fort William Land Investment Co.*, [1912] A.C. 224; *Hammersmith and City R.W. Co. v. Brand* (1869), L.R. 4 H.L. 171; *Ash v. Great Northern Piccadilly and Brompton R.W. Co.* (1903,) 19 Times L.R. 639. Owing to the changes in the law effected by sec. 238, *Corporation of Parkdale v. West* (1887), 12 App. Cas. 602, is no longer applicable. The acts of which the respondent complained were lawfully done in the execution of the order of the Board. As to the damages alleged to have been caused by vibration, that matter could be dealt with when the time came to fix the compensation, under the Railway Act.

G. H. Watson, K.C., for the plaintiff, respondent, contended that the appellants had no right to proceed with the elevation of the tracks or otherwise to interfere with Albany avenue until they had first complied with the requirements of sec. 167 of the Railway Act, R.S.C. 1906, ch. 37, by submitting to the Board a plan, profile, and book of reference, as required thereby, obtaining the sanction of the Board to the proposed change being made, and depositing copies of the plan, profile, and book of reference in the office of the Registrar of Deeds for the locality, and giving public notice of the deposit, and had also made compensation to the respondent. He also urged that, the applicants having no right to make the application, the Board had no jurisdiction to make the order. He also submitted that the Board had no jurisdiction to close a highway or to order a highway to be closed: *Corporation of Parkdale v. West*, 12 App. Cas. 602; *In re Closing Highways at Railway Crossings* (1913), 15 Can. Ry. Cas. 305. The respondent was entitled to damages for disturbance by vibration: *Re Birely and Toronto Hamilton and Buffalo R.W. Co.* (1897), 28 O.R. 468.

MacMurchy, in reply.

April 19. The judgment of the Court was delivered by MEREDITH, C.J.O.:—This is an appeal by the defendants from the judgment, dated the 4th February, 1916, which was directed

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to be entered by the Chief Justice of the King's Bench, after the trial of the action before him, sitting without a jury, at Toronto, on the previous 31st January.

The respondent is the owner of part of lot number 2 in block B. on the west side of Albany avenue, in the city of Toronto, and sues to recover damages for the alleged wrongful interference by the appellants with the grade of the street, for closing up that part of it which lies to the north of the respondent's land, and for the injury to his house caused, as he alleges, by the additional vibration occasioned by the running of the trains on the tracks which have been elevated; or, in the alternative, for a mandatory order requiring the appellants forthwith to give the necessary notices and to take all necessary and proper proceedings under the Railway Act to provide compensation to the respondent, and for payment to him for the injury and loss which he had sustained, and, if necessary for that purpose, that arbitration proceedings be directed and ensue.

The acts of which the respondent complains were done in the course of elevating the tracks of the railway between Davenport road and Summerhill avenue, and for the purpose of carrying out a plan which had been adopted for getting rid of certain of the grade crossings in that part of the city.

The appellants justify these acts as having been lawfully done under the authority of the Railway Act (Canada) and of an order made by the Board of Railway Commissioners of Canada; and they contend that, if the respondent's property has been injuriously affected by what has been done, he must seek compensation under the Act.

The adoption of the scheme for the elevation of the tracks which has been carried out was brought about in consequence of a communication dated the 15th July, 1909, addressed by the Board to the appellants the Canadian Pacific Railway Company, as well as to other railway companies, in which attention was called to the provisions of sec. 7 of an Act of the Parliament of Canada (8 & 9 Edw. VII. ch. 32) passed for the purpose of securing in the public interest the gradual elimination of grade crossings, and the railway company were asked to furnish to the Board a list of the crossings upon their lines which in their opinion "should be the ones to make a start at." In compliance with this request,

the appellants the Canadian Pacific Railway Company designated (I apprehend in addition to other crossings) the Yonge street crossing. The Board's Chief Engineer (Mr. Mountain), by direction of the Board, examined this crossing, and recommended as "the proper solution of the question" the elimination of two or three grade crossings on each side of Yonge street as well as the one on Yonge street, by elevating the tracks. The report of Mr. Mountain is dated the 19th January, 1910. A meeting of the Board took place on the 27th of the same month for "consideration of the elimination of the grade crossing of the Canadian Pacific Railway Company at Yonge street, North Toronto, Ontario." At this meeting, representatives of that company and of the City of Toronto were present, and the proceedings began by the representative of the railway company saying: "This is another case taken up on the initiative of the Board."

No conclusion was come to by the Board at this meeting, but an adjournment was made until the 1st February following. Mr. E. W. Beatty appeared for the railway company at the adjourned meeting. The further consideration of the matter was again adjourned, and the adjourned meeting was held on the 7th June, 1910, at which Mr. Beatty again appeared, and the City of Toronto and the Toronto and York Radial Railway Company were represented.

At or before this meeting, plans of the proposed track elevation prepared by the railway company were filed with the Board, and Mr. Beatty said that they had been filed "as ordered by the Board in March." There does not appear to have been any meeting in March, and the reference is probably to what occurred at the meeting on the 1st February, at which it appears that it was arranged that the railway company should furnish plans shewing what "they propose doing."

On the 13th September, 1910, an order was made by the Board approving "the plan dated May, 1910, shewing the proposed lay-out across . . . Yonge street and Avenue road filed by the railway company, and on file with the Board under file number 9437153."

Nothing further appears to have been done until the 23rd May, 1912, when the matter was further considered by the Board and detail plans of the separation of grades at Yonge street and Avenue road were approved as submitted.

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By an order of the Board, dated the 29th June, 1912, made as it states, "in the matter of the consideration of the question of the elimination of grade crossing by the tracks of the Canadian Pacific Railway Company at Yonge street, North Toronto, in the Province of Ontario," it is ordered that "the plan shewing the track elevation of the said proposed joint section of railway to be used by the Canadian Pacific Railway Company and the applicant company from Summerhill avenue to Dovercourt road, dated May 15th, 1912, filed with the Board under the said file No. 1202170, is hereby approved, except . . ."

The plan referred to in the order is annexed to it, and the plan shews the crossing at Albany avenue and the grade of the track there, and it shews also that part of that street is to be closed.

Acting under the authority of this order, the elevation of the tracks was proceeded with and has been completed, and a by-law has been passed by the Municipal Council of the Corporation of the City of Toronto closing that part of Albany avenue which is bounded on the north by a line distant forty-one feet six inches northerly from the northerly limit of the right of way of the Canadian Pacific Railway Company and on the south by the southerly limit of that right of way. The by-law was passed on the 21st May, 1915; but it appears that, after the work of elevating the tracks was begun, fences were erected and maintained by the appellants or one of them at each end of the part of Albany avenue which is closed by the by-law.

It was contended by Mr. Watson that the appellants had no right or power to proceed with the elevation of the tracks or otherwise to interfere with Albany avenue unless and until they had complied with the requirements of sec. 167 of the Railway Act (R.S.C. 1906, ch. 37), by submitting to the Board of Railway Commissioners for Canada a plan, profile, and book of reference of the portion of the "railway proposed to be changed, shewing the deviation, change or alteration proposed to be made," obtaining the sanction of the Board to the proposed change being made, and by depositing copies of the plan, profile, and book of reference in the office of the Registrar of Deeds for the locality, and giving public notice of the deposit, and had also made compensation to the respondent before interfering with his rights.

Mr. Watson also contended that the order of the Board was made on the application of the appellants or one of them, and that

the Board had no jurisdiction to make the order, because, as he contended, the applicants had no *locus standi* to make the application.

He also contended that the Board had no jurisdiction to close a highway or to order a highway to be closed.

Unless the changes that have been made in the Railway Act since the case of *Corporation of Parkdale v. West* (1887), 12 App. Cas. 602, was decided, have altered the law so as to make what were then held to be conditions precedent to the right of the railway company to lower the grade of a highway and to carry it by a subway under the railway pursuant to an order of the Railway Committee of the Privy Council, sanctioned by the Governor in Council, no longer conditions precedent, that case is conclusive against the appellants.

It was there decided that an order of the Railway Committee of the Privy Council, under sec. 4 of 46 Vict. ch. 24, did not of itself, and apart from the provisions of law thereby made applicable to the case of land required for the purpose of carrying out the requirements of the Railway Committee, authorise or empower the railway company upon whom the order is made to take any person's land or to interfere with any person's right; that where a railway company, acting under an order of the Railway Committee does not deposit a plan or book of reference relating to the alterations required by the order, and give the notice of the deposit prescribed by the Act, it is not entitled to commence operations, and that payment of compensation by the railway company was a condition precedent to its right of interfering with the possession of land or the rights of individuals.

The Act under consideration in that case was the Consolidated Railway Act, 1879 (42 Vict. ch. 9), as amended by 46 Vict. ch. 24.

Sections 48 and 49 of the Act of 1879 were repealed by sec. 4 of the amending Act, and there was substituted for sec. 48 the following section: "48. In any case where any portion of a railway is constructed, or authorised or proposed to be constructed, upon or along, or across any turnpike road, street or other public highway, on the level, the railway company, before constructing or using the same, or in the case of railways already constructed within such time as the Railway Committee shall direct, shall submit a plan and profile of such portion of railway, for the approval of

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the Railway Committee; and the Railway Committee, if it appears to them necessary for the public safety, may, from time to time, with the sanction of the Governor in Council, authorise and require the company to whom such railway belongs, within such time as the said Committee directs, to carry such road, street or highway either over or under the said railway, by means of a bridge or arch, instead of crossing the same on the level, or to execute such other works as under the circumstances of the case appear to the said Committee the best adapted for removing or diminishing the danger arising from the then position of the railway, or to protect such road, street or highway by a watchman, or by a watchman and gates or other protection; and all the provisions of law at any such time applicable to the taking of land by railway companies and its valuation and conveyance to them, and to the compensation therefor, shall apply to the case of any land required for the proper carrying out of the requirements of the Railway Committee. . . ."

The Railway Committee, acting under the authority of this section, on the 21st September, 1883, reported that the Committee deemed it necessary for public safety that the railway companies interested be authorised and required to carry Queen street under their railways by means of a bridge or subway with the necessary approaches to it, and the report was approved by the Governor in Council.

A subway was accordingly constructed, the effect of which was to lower the roadway in front of the plaintiffs' property and to deprive them of the access to Queen street which they had previously enjoyed, and to injure their property very seriously.

No plan or book of reference of or as to the work had been deposited in the office of the Clerk of the Peace, as required by clause 2 of sec. 8 of the Act of 1879, nor had any notice been given, as required by clause 10 of sec. 9 of the same Act; and, therefore, as provided by clause 8 of sec. 8, the railway companies were not entitled to proceed with "the execution of the railway, or of the part thereof affected by the alterations, as the case may be."

As I have said, it was also held that until compensation had been paid to the persons whose lands were or would be affected injuriously by the work, or a warrant for immediate possession had been obtained after notice to these persons (sec. 9, clauses

27 and 28), the railway companies were not entitled to proceed with the work.

It is unnecessary to go through the various changes that have been made from time to time in the legislation. It will suffice to say that changes were made in 1888 by 51 Vict. ch. 29, and in 1903 by 3 Edw. VII. ch. 58; that the Railway Act was revised in 1906, and appears as ch. 37 in the Revised Statutes of that year; and that the provisions which affect the question for decision were enacted by 8 & 9 Edw. VII. ch. 32.

By secs. 4 and 5 of that Act, secs. 237 and 238 of ch. 37 of the Revised Statutes were repealed, and new sections bearing the same numbers were substituted for them, and (by secs. 6 and 7) new sections, numbered 238A and 239A, were added.

Section 237 deals with applications for leave to construct a railway upon, along, or across a highway, and its provisions need not be referred to further than to say that it deals only with applications by railway companies.

An important change was effected by the new sec. 238, which provides as follows:—

“238. Where a railway is already constructed upon, along or across any highway, the Board may, upon its own motion, or upon complaint or application, by or on behalf of the Crown, or any municipal or other corporation, or any person aggrieved, order the company to submit to the Board, within a specified time, a plan and profile of such portion of the railway, and may cause inspection of such portion, and may inquire into and determine all matters and things in respect of such portion, and the crossing, if any, and may make such order as to the protection, safety and convenience of the public as it deems expedient, or may order that the railway be carried over, under or along the highway, or that the highway be carried over, under or along the railway, or that the railway or highway be temporarily or permanently diverted, and that such other work be executed, watchmen or other persons employed, or measures taken as under the circumstances appear to the Board best adapted to remove or diminish the danger or obstruction in the opinion of the Board arising or likely to arise in respect of such portion or crossing, if any, or any other crossing directly or indirectly affected.

“2. When the Board of its own motion, or upon complaint or application, makes any order that a railway be carried across

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or along a highway, or that a railway be diverted, all the provisions of law at such time applicable to the taking of land by the company, to its valuation and sale and conveyance to the company, and to the compensation therefor, shall apply to the land exclusive of the highway crossing, required for the proper carrying out of any order made by the Board.

"3. Notwithstanding anything in this Act, or in any other Act, the Board may, subject to the provisions of section 238A of this Act, order what portion, if any, of cost is to be borne respectively by the company, municipal or other corporation, or person in respect of any order made by the Board under this or the preceding section, and such order shall be binding on and enforceable against any railway company, municipal or other corporation or person named in such order."

Section 238A made it the duty of railway companies, in the case of railways constructed after the passing of the Act, at their own cost and expense, to "provide, subject to the order of the Board, all protection, safety and convenience for the public in respect of any crossing of a highway by the railway."

Section 239A is a new section, and makes an appropriation for the purpose of aiding in the providing, by actual construction work, of protection, safety, and convenience for the public in respect of highway crossings of the railway at rail level, in existence on the 1st day of April, 1909.

Section 238 plainly, I think, deals with proceedings *in invitum* of the railway company, and was passed to facilitate the elimination or diminishing of grade crossings, which was, in the opinion of Parliament, so important a matter as to justify the application of public money in order more easily and speedily to effect the desired object; and it was in furtherance of this object, no doubt, that the Board was empowered to act upon its own motion, as it is provided in sec. 238 it may.

The power vested in the Board to order that a "highway be temporarily or permanently diverted," and the wide power to order such measures to be taken "as under the circumstances appear to the Board best adapted to remove or diminish the danger or obstruction in the opinion of the Board arising or likely to arise in respect of such portion or crossing, if any, or any other crossing directly or indirectly affected," in my opinion

confer authority upon the Board to order that part of a highway be closed, or at all events authority to require the proper municipal authority to close it.

If I am right in so interpreting sec. 238, it follows, I think, that *Corporation of Parkdale v. West* does not apply. It was by reason, and by reason only, of the provisions of the Railway Act which were applied having been made applicable by sec. 4 of 46 Vict. ch. 24, that the conclusion to which the Judicial Committee came was reached.

Section 238, it will have been observed, does not make applicable the provisions of law as to the matters to which it refers, to anything but an order that "a railway be carried across or along a highway" or that "a railway be diverted." The order in question does not require that the railway "be carried across or along a highway," nor does it require the "railway to be diverted." It in effect blots out the highway between the points mentioned in the by-law and vests that part of it in the railway company.

For these reasons, I am of opinion that *Corporation of Parkdale v. West* does not apply, and that the acts of which the respondent complains were lawfully done in the execution of the order of the Board, unless the contention of the respondent's counsel that the Board had no jurisdiction to make the order, for the reason I have already mentioned, is entitled to prevail.

I am of opinion that that contention is not well-founded. It is manifest from the narrative I have given of the proceedings of and before the Board, that the Board, in making the order in question, was acting under sec. 238, and upon its own motion. The proceedings were initiated by the Board, and everything that was subsequently done was consequent upon the initial action taken by the Board with the view of carrying out the policy of Parliament to eliminate, or to diminish the number of, grade crossings.

In the view I take as to the proper disposition to be made of the appeal, it is unnecessary to determine the question as to the right of the respondent to be compensated for the damage alleged to have been done to his building, which he attributes to the increased vibration caused by the elevation of the railway tracks, as that is a matter which will be dealt with in determining the compensation to which the respondent is entitled.

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Upon the argument, counsel for the appellants expressed their willingness to proceed to arbitration to determine the compensation to which the respondent may be entitled for the injurious affection of his property by the closing of the part of the highway which has been closed and for any injury he may have sustained by the elevation of the tracks, so far as that is a matter for which, under the Railway Act, he is entitled to be compensated; and, in my opinion, the proper disposition to be made of the appeal is that, upon the appellants undertaking to proceed without delay to determine the compensation to be paid to the respondent in respect of these matters, the appeal should be allowed and the action be dismissed, and that in the circumstances the parties should be left to bear their own costs of the action and of the appeal.

Appeal allowed.

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[APPELLATE DIVISION.]

March 20.
April 19.

RE GEFRASSO.

Infant—Custody—Illegitimate Child—Rights of Mother—Interest of Infant—Foster-parents—Discretion of Judge in Chambers—Appeal.

The desire of the mother of an illegitimate child as to its custody is primarily to be considered and must be given effect to, unless it would be prejudicial to the child's interests if it were delivered into the custody of the mother. But the Court, acting as a wise parent, is not bound to sacrifice the child's welfare to the *fetish* of parental authority, by forcing it from a happy and comfortable home to share the fortunes of a parent, however innocent, who cannot keep a roof over its head, or provide it with the necessities of life. *Barnardo v. McHugh*, [1891] A.C. 388, and *In re O'Hara*, [1900] 2 I.R. 232, 240, 241, followed.

Where an illegitimate child was, a few months after its birth, handed over by the mother to foster-parents, by whom it was cared for and comfortably maintained for more than six years, the mother's application to have its custody transferred to her, she having in the meantime taken no interest in the child, and being without means and without a suitable home, was, in the interest of the infant, refused by SUTHERLAND, J., in Chambers, in the exercise of his discretion; and his order was affirmed by a Divisional Court, on the mother's appeal.

APPLICATION by Millicent Ratcliffe, the mother of an illegitimate child, Millicent Catharine Gefrasso, six years of age, for an order awarding the applicant the custody of the child, who, a few months after her birth, had been placed by the applicant with the respondents, in whose custody the child was at the time of the application.

March 7. The motion was heard by SUTHERLAND, J., in Chambers.

T. C. Robinette, K.C., for the applicant.

W. A. Henderson, for the respondents.

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March 20. SUTHERLAND, J.:—An application on the part of Millicent Ratcliffe, the mother of an illegitimate child, Millicent Catharine Gefrasso, for an order that she have the custody thereof.

The child was born on the 5th July, 1909, and was placed by the mother, a few months thereafter, with William Warwood and Jennie Warwood, on condition, as she says in her affidavit, that they would keep it until such time as she could arrange a home for it.

The applicant is a Roman Catholic, and expresses herself to be anxious that the child should be brought up in that faith. The Warwoods are Protestants, and the applicant is of opinion that, if the child remains in their custody, it will be impossible for it to be brought up in the religious belief that she desires.

The applicant is a housemaid employed with Mrs. Catharine Rudd at 288 Ontario street, Toronto, and the latter states in an affidavit filed in support of the motion that she has found her to be a "straightforward, honest, good-living woman" and "apparently anxious about her child." Mrs. Rudd is said to be a married woman with a little girl of her own of eight years, attending school, and says she is in a position to provide a comfortable home for the applicant and her child, and that she will take an interest in the latter and see that she is properly cared for and will attend school. Mrs. Rudd, it is said, however, keeps a rooming-house, where there are some nine roomers.

The applicant states in her affidavit that on or about the 20th December, 1915, accompanied by Mrs. Rudd, she visited the home of the Warwoods and found her daughter in a destitute condition, wretchedly clothed and in a dirty and filthy condition, and Mrs. Rudd in her affidavit also states that at the time referred to the girl was in a dirty and neglected condition.

The Warwoods are opposing the motion. Mrs. Warwood says that the infant child was left with her by the applicant on the understanding that she was to adopt it and have it become one of her own family, and that she, Mrs. Warwood, was to look after its support, maintenance, and education. She also says that on

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the 20th December, 1915, when the applicant and Mrs. Rudd called at her home, the child was cleanly dressed and not in a filthy condition as alleged. She expresses the belief in her affidavit that the applicant is not a fit and proper person to have the custody and control of the child, "by reason of the fact that she has not lived a proper and virtuous life for some years after" she "had taken over the possession of the said child."

William Warwood says that the arrangement between him and the applicant, when the child came to live with them, was that, if the applicant was willing to give up the custody and control of the child, he and his wife would bring it up in his house and would rear it as one of their own children; that this arrangement was agreed to, and it was upon this understanding that the child was brought to his home. He further says that the understanding was that he and his wife were to have the absolute control and custody of the child. He also says that, at the time, the applicant "stated that she was a Roman Catholic," and he "then advised her that there was no objection to the child being brought up in that religion if the child so desired it;" that the applicant thereupon said that she did not "have any objection to the religious upbringing of the child." He states that the child has always received the best care and attention, and has been treated as one of their own family and one of their own children. He also states that he has always been able to support, maintain, and educate his family; that he owns his own property and is in a position to give the child as good a home as his own children and is now in a position to support and maintain her. He also expresses the belief that the applicant is not a fit and proper person to have the custody and control of a child of tender years.

One Regina Ellis, a married woman, states in an affidavit filed on the motion that she is a neighbour of the Warwoods and has known them for ten years; that she has always found them respectable married people, who look after the care and welfare of their children; that she has had opportunity from time to time to observe the care and attention bestowed upon the infant in question, and that she can truthfully say that the child has had the best care and attention and has been well provided for; that the child has been in the habit of playing with her own infant daughter, and she has thus had "practically an opportunity of observing her from day to day for the last five or six years."

This is not a contest between the father and mother of an illegitimate child. In *In re The Queen v. Armstrong* (1856), 1 P.R. 6, McLean, J., at p. 9, says: "In law an illegitimate child is regarded as *filius nullius*, and can therefore have no legal or natural guardian, unless the mother can be so considered from the fact of her having given it birth, and its continuing in her charge and custody. If, however, the mother chooses to part with her child, and to make an arrangement for its support with the alleged father, the custody of the child being actually transferred under such arrangement, becomes a legal and not an improper custody, and a Court or Judge will not interfere to assist in breaking up such an arrangement, more especially if it appears, as in this case, to be one obviously for the advantage, not only of the child, but of all the parties concerned."

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It is true that in a case of legitimate children it has been held that the law of this Province "knows nothing of adoption; and an agreement by parents to deprive themselves of the custody of their child is not legally binding upon them;" and that "where the parents of an infant placed her in charge of a stranger, agreeing to pay for her maintenance, and afterwards signed an agreement to give up all claim to the child, an order was made, upon the father's application, for delivery of the child to him, upon an undertaking to pay to the person who had assumed to adopt the child the expense incurred by that person." *Re Davis* (1909), 18 O.L.R. 384.

But in *In re Holeshed* (1870), 5 P.R. 251, it was held (1) "that the mother of an illegitimate child is not entitled to all the rights of guardian for nurture. (2) That the mother differs only from a stranger in this, that during the period of nurture (under seven) the child may not be separated from the mother by force or fraud. (3) But when she has abandoned the child, and others have adopted it, or if she has placed it under the protection of others, and afterwards claims it as its mother or guardian for nurture, the Court will not recognise such claim as a legal right, but will refuse to interfere, if the interests of the infant will thereby be best protected."

In *In re Brandon* (1878), 7 P.R. 347, it was held, on a review of the authorities relating to the custody of illegitimate children, that it is in the discretion of the Court to decide who shall have

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the custody of an illegitimate child. In that case the Court decided that "the putative father, the mother being dead, is *primâ facie* entitled to such custody as against the maternal grandfather," even though the child had been entrusted to the grandfather's care by the mother before her death, and was taken away from his custody by improper means. The reason, however, appears to have been that the arrangements which the father had made for the support and maintenance of the child were such as to commend themselves to the Court as likely to conduce to the best interests of the child.

In *Barnardo v. McHugh*, [1891] A.C. 388, it was held that "in determining who is to have the custody of and control over an illegitimate child the Court in exercising its jurisdiction with a view to the benefit of the child will primarily consider the wishes of the mother." But also that "the authorities do not establish the proposition that the legal rights of the mother of an illegitimate child as to its custody are the same as those of the father of a legitimate child." At p. 399 Lord Herschell says: "Of course, if it can be shewn that it would be detrimental to the interest of the child that it should be delivered to the custody of the mother or of any person in whose custody she desires it to be, the Court, exercising its jurisdiction, as it always does in such a case, with a view to the benefit of the child, would not feel bound to accede to the wishes of the mother."

Upon the facts disclosed in the material before me, I am not prepared to say that in the interest of the infant it would be better that she should be taken from the custody of those who have acted as foster-parents to her for a number of years, and given to the mother, who has apparently taken little or no interest in her, and who, I am not satisfied, is as fit and proper a person to have charge of her, or can give her as safe, comfortable, and appropriate a home.

I feel convinced that the best interest of the child will be served by leaving her with the Warwoods: *Re Longaker* (1908), 12 O.W.R. 1193, 1197; *Re Faulds* (1906), 12 O.L.R. 245; *Stourton v. Stourton* (1857), 8 D.M. & G. 760, 771; *In re W., W. v. M.*, [1907] 2 Ch. 557, at p. 566.

I do not deem it necessary to say anything about the further question of the child's religion, as it was stated upon the argument

by counsel for the Warwoods that they were not averse to the child being brought up in the Roman Catholic faith.

I therefore make no order as asked. There will be no order as to costs.

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Millicent Ratcliffe appealed from the order of SUTHERLAND, J.

April 4. The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, J.J.A.

T. C. Robinette, K.C., for the appellant, argued that, under the arrangement made at the time the child was handed into the custody of the respondents, the respondents were to take care of the child until the appellant could arrange a home for her. She now had the home, and should have the custody of her child. The mother was most anxious that the child should be brought up in the Roman Catholic faith, and there was danger that, if left in her present surroundings, she might not. A parent does not abandon parental rights by making an agreement with outsiders for the custody of his or her child: *Re Faulds*, 12 O.L.R. 245. While the welfare of the infant is in one sense paramount, the parental right to custody is supreme unless it is clearly made out that the child's protection requires another disposition. The law of Ontario knows nothing of adoption; and an agreement by parents to deprive themselves of the custody of a child is not legally binding: *Re Davis*, 18 O.L.R. 384. The desire of the mother of an illegitimate child as to its custody is primarily to be considered and must be given effect to, unless complying with that desire would be prejudicial to the child's interests: *Barnardo v. McHugh*, [1891] A.C. 388; *Re C., an Infant* (1911), 25 O.L.R. 218; *Re Maher* (1913), 28 O.L.R. 419. Here there would be no prejudice to the infant, but rather benefit.

W. A. Henderson, for William and Jennie Warwood, the respondents, contended that the arrangement made with the appellant about the custody of her child was that the respondents were to adopt the child and bring it up as one of their own family, and that the appellant was to give up the custody and control of the child. The appellant had not evinced such interest in her child as would justify the Court in handing over the custody to her. The respondents had provided the child with a good home,

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which the evidence did not shew the appellant could do. The mother of an illegitimate child should not be given its custody, if the interests of the infant would be better protected otherwise: *In re Holeshed*, 5 P.R. 251; *In re McGrath (Infants)*, [1893] 1 Ch. 143. The best interests of the child would be served by leaving her with the respondents. The respondents were willing that the child should be brought up a Roman Catholic, if the appellant so desired.

Robinette, in reply.

April 19. The judgment of the Court was delivered by MEREDITH, C.J.O.:—This is an appeal by Millicent Ratcliffe from an order made by Sutherland, J., dated the 20th March, 1916, dismissing the application of the appellant for an order that she should have the custody of her infant daughter Millicent Catharine Gefrasso.

The infant is the illegitimate child of the appellant, by a man named Gefrasso, and is now six years of age. When the child was three or four months old, the appellant, who was in indigent circumstances, placed the child in the custody of the respondents. There is a conflict of testimony as to the terms of the arrangement then made. According to the testimony of the appellant, it was that the respondents were to take care of the child until the appellant could arrange for a home for her. This is denied by the respondents, who say that the arrangement was that they were to rear the child as if it were their own, and that the appellant should give up its custody and control to them. There is also a conflict of testimony as to the interest which the appellant has evinced in her child and her welfare. According to the testimony of the respondents, she never, before last December, except for two months shortly after the child was taken by the respondents, during which the appellant was employed to nurse a son of the respondents, who was ill with scarlet fever, visited their residence or made any inquiries of them as to the child. This is denied by the appellant, but her affidavit on this point is not satisfactory.

There is also a conflict of testimony as to the care that the respondents have taken of the child. The appellant deposes that she saw the child at the respondents' house on the 20th December last, and that she was then dressed in rags and filthy, and that the

house also was in a filthy condition. Catharine Rudd, who accompanied the appellant on this occasion, deposes that the child was found to be in a dirty and neglected condition. This is denied by the respondents in their affidavits; and, according to the affidavit of Rogina Ellis, a neighbour of theirs who has known them for ten years, and has had an opportunity of observing the child from day to day ever since she has lived with the respondents, she has had the best care and attention and has been well provided for.

The child was baptized into the Roman Catholic Church, and the respondents are Protestants.

The appellant is now in service as a housemaid in a "rooming-house" kept by Catharine Rudd, and her wages are \$20 a month, and there are nine roomers in the house, but whether men or women or both does not appear. The appellant proposes to take the child to this rooming-house to live with her there, and Mrs. Rudd is willing that she should do so, and says that she has a little girl of her own, eight years of age, and is in a position to provide a comfortable home for the appellant and her child, and that she will take an interest in the child and see that she is properly cared for and attends school as if she were her own child.

The proper conclusion upon the evidence, in my opinion, is that the respondents have properly cared for the child and that they will do so in the future, if she is allowed to remain with them, and that the interest of the child will be better subserved if she remains a member of the respondents' family, than if she is entrusted to the care and custody of the appellant. I doubt whether a "rooming-house" is a desirable place in which to bring up a young female child, and at best there is no certainty that the home which she purposes to provide for the child will always be available to her. She is a monthly servant, and her engagement with Mrs. Rudd is therefore of uncertain duration. If she and Mrs. Rudd should part, the appellant will have no home to which to take her child, and she has no means for providing one. She says that she can always find employment, but it is at least doubtful whether there are many who would permit her child to live with her; and it is obvious that, even if she were permitted to do so, the child would not have the care and attention she ought to receive and the inestimable benefit of having a place which

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she could call "home." In addition to this, if she remains with the respondents, and bears, as she now does, their name, the stain of illegitimate birth, of which she is guiltless, will be forgotten or effaced, and there will be less danger of her having to undergo the humiliation of being pointed at as a "bastard," a humiliation which will be the greater as her years increase. The question for decision then is, do these considerations affecting the welfare of the child outweigh the claims of the appellant?

It is settled law that the desire of the mother of an illegitimate child as to its custody is primarily to be considered and must be given effect to, unless it would be prejudicial to the child's interests, if it were delivered into the custody of the mother: *Barnardo v. McHugh*, [1891] A.C. 388.

The remarks of FitzGibbon, L.J., in *In re O'Hara*, [1900] 2 I.R. 232, 240-1, appear to me to be directly applicable to the facts of this case. He was there dealing with the rights of the mother of her legitimate child, whose father was dead, and, speaking of what is sufficient to displace her *primâ facie* right to its custody, said: "It appears to me that misconduct, or unmindfulness of parental duty, or inability to provide for the welfare of the child, must be shewn before the natural right can be displaced. Where a parent is of blameless life, and is able and willing to provide for the child's material and moral necessities, in the rank and position to which the child by birth belongs—i.e., the rank and position of the parent—the Court is, in my opinion, judicially bound to act on what is equally a law of nature and of society, and to hold (in the words of Lord Esher) that 'the best place for a child is with its parent.' Of course I do not speak of exceptional cases—of which this, fortunately, is not one—where special disturbing elements exist, which involve the risk of moral or material injury to the child, such as the disturbance of religious convictions or of settled affections, or the endurance of hardship or destitution with a parent, as contrasted with solid advantages offered elsewhere. The Court, acting as a wise parent, is not bound to sacrifice the child's welfare to the *fetish* of parental authority, by forcing it from a happy and comfortable home to share the fortunes of a parent, however innocent, who cannot keep a roof over its head, or provide it with the necessities of life."

If these exceptions warrant an interference with the *primâ*

facie right of a parent of a legitimate child, they *à fortiori* do so where the child is illegitimate.

The case at bar comes, I think, within the exceptions mentioned by FitzGibbon, L.J. It is not unfair to say that the appellant has been, in the years during which her child has been maintained by the respondents, unmindful of her parental duty. This is shewn by the fact, which is, I think, established, that during all that time until she was about to launch her application she had evinced no interest in her child and not even seen it except during the two months in which she was in the service of the respondents. She has also failed to satisfy the Court that she is able and willing to provide for the child's material and moral necessities, and she is seeking to force it from a comfortable and happy home to share her fortunes when she is unable to provide for it a permanent home or even a temporary one that is a suitable one in which to bring up a female child of tender years.

My brother Sutherland, in the exercise of his discretion, has decided against the appellant. I cannot say that his discretion was wrongly exercised, or that it proceeded upon a misapprehension of the facts or a mistaken view of the law, and it follows therefore that his order must be affirmed and the appeal be dismissed.

The respondents expressed their willingness that the child should be brought up in the Roman Catholic faith if the appellant so wishes. If the parties desire it, the case may be spoken to as to this and as to making provision for the appellant seeing the child, but it is to be hoped that these matters may be arranged between the parties without further discussion before the Court.

I have not referred to the Infants Act.* It may be that under it the right of the mother may not be as ample as it was held to be in the cases to which I have referred. No costs.

Appeal dismissed.

*See R.S.O. 1914, ch. 153, sec. 2.

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[APPELLATE DIVISION.]

April 19.

ST. DENIS v. EASTERN ONTARIO LIVE STOCK AND POULTRY
ASSOCIATION.

Negligence—Explosion of Boiler in Building—Death of Person Engaged therein—Action by Widow under Fatal Accidents Act—Defence—Settlement of Claim—Absence of Concluded Bargain—Common Employment—Negligence of Defendants' Superintendent and Engineer—Findings of Jury—Supplemental Finding by Appellate Court—Explanation of Explosion.

The plaintiff's husband (the partner of a man who had a contract with the defendants) was killed by the explosion of a boiler which was in use for heating a building in which the defendants were holding an exhibition; and she brought this action, under the Fatal Accidents Act, to recover damages for his death:—

Held, that a defence set up by the defendants, that the plaintiff had made a settlement of her claim by an agreement with a city corporation, the owners of the building, failed because, assuming the authority (which was disputed) of a certain solicitor to make a settlement for the plaintiff, there never was a concluded bargain binding on the city corporation for the settlement of the plaintiff's claim.

(2) That the plaintiff's deceased husband was not, at the time of his death, in the service of the defendants; and no question of common employment arose.

(3) That there was no other reasonable explanation of the explosion than that it was occasioned by the negligence of the defendants' superintendent and their engineer in charge of the boiler; that the jury's finding that the superintendent was negligent was warranted by the evidence, and should be supplemented by a finding that the engineer was negligent; and that the defendants were liable for the negligence of both.

McArthur v. Dominion Cartridge Co., [1905] A.C. 72, applied.

AN appeal by the defendants from the judgment of SUTHERLAND, J., at the trial, upon the findings of a jury, in favour of the plaintiff.

The action was brought, under the Fatal Accidents Act, by the widow of Napoleon St. Denis, who met his death by reason, as she alleged, of the negligence of the defendants.

The man was killed by the explosion of a boiler in a building in which the defendants were holding an exhibition.

The defendants alleged that the explosion was not caused by their negligence, and also set up as a bar to the action an agreement alleged to have been made between the plaintiff and the Corporation of the City of Ottawa in settlement of an action brought by her against that corporation.

April 5 and 6. The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, JJ.A.

Peter White, K.C., for the appellants. The learned trial Judge was in error in ruling that the respondent was not bound by the agreement made by the solicitors for the defendants with the former solicitor of the respondent in an action brought by the respondent against the Corporation of the City of Ottawa. He should have ruled that the respondent's then solicitor had authority to make the settlement: *Neale v. Gordon Lennox*, [1902] A.C. 465. The deceased was a servant of the association; and, the negligence found being that of a fellow-servant, no action can lie: Halsbury's Laws of England, vol. 20, p. 67, para. 134; *Waller v. South Eastern R.W. Co.* (1863), 2 H. & C. 102; *Charles v. Taylor* (1878), 3 C.P.D. 492; *Morgan v. Vale of Neath R.W. Co.* (1865), L.R. 1 Q.B. 149; *Junor v. International Hotel Co. Limited* (1914), 32 O.L.R. 399; *Woods v. Toronto Bolt and Forging Co.* (1905), 11 O.L.R. 216; *Canadian Coloured Cotton Mills v. Talbot* (1897), 27 S.C.R. 198; *Collins v. Toronto Hamilton and Buffalo R.W. Co.* (1908), 13 O.W.R. 165. The jury, it would seem, did not mean to find that the appellants or their superintendent, Davitt, were guilty of negligence which caused the accident. If they did, there was no evidence to support the finding.

R. V. Sinclair, K.C., for the plaintiff, respondent. There was no express authority from the respondent to the solicitor who made the agreement, and so she was not bound by it. The jury so found. As to common employment, the deceased was a partner of one Hilliard, with whom the appellants had entered into a contract for the killing and dressing of cattle. Hilliard was not the servant of the appellants, and St. Denis was killed while engaged in carrying out this contract. The jury's answers amount to a finding of negligence on the part of Davitt, and there was evidence to support that finding. There was no other reasonable explanation of the accident than that it was caused by the negligence found: *McArthur v. Dominion Cartridge Co.*, [1905] A.C. 72.

White, in reply.

April 19. The judgment of the Court was delivered by MEREDITH, C.J.O.:—This is an appeal by the defendants from the judgment, dated the 21st January, 1916, which was directed to be entered by Sutherland, J., on the findings of the jury at the trial of the action at Ottawa on the 19th and 20th days of that month.

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The action is brought, under the Fatal Accidents Act, by the widow of Napoleon St. Denis, who met with his death owing, as she alleges, to the negligence of the appellants.

The deceased was killed owing to the explosion of a boiler which was in use for heating a building in which the appellants were holding an exhibition, and it is admitted that the appellants are liable if the explosion was due to their negligence or that of any person entrusted with the superintendence of the boiler and its operations, unless the respondent is bound by an agreement made by the solicitors for the defendants in an action brought by the respondent against the Corporation of the City of Ottawa, with Mr. Lemieux, the former solicitor for the respondent in that action, for the settlement of the respondent's claim for \$3,000, that action being against the corporation, who were charged with negligence to which the explosion was alleged to have been due.

The learned trial Judge ruled that, in the absence of express authority from the respondent to the solicitor who made the agreement, to make the settlement, she was not bound by it, and he left it to the jury to find whether the respondent had authorised Mr. Lemieux to settle, and the finding was that she had not.

It was argued by counsel for the appellants that this ruling was erroneous, and that the learned Judge should have ruled that Mr. Lemieux had authority to make the settlement, it not being shewn, as was contended, that the solicitor's authority had been, to the knowledge of the defendants the Corporation of the City of Ottawa, withdrawn, and Mr. Lemieux forbidden to make the settlement.

It is unnecessary to consider this aspect of the case, because I am of opinion that, assuming that this contention is well-founded, the appellants must fail on this branch of the case, because there was never a concluded bargain binding on the Corporation of the City of Ottawa for the settlement of the respondent's claim.

There was no corporate action by which the settlement was agreed to, and the only corporate action was the passing of a by-law on the 21st December, 1914. By this by-law the sum of \$7,800 was set aside and appropriated for the purpose of making provision for the payment of certain death and personal injury

claims filed in respect of the boiler explosion at Howick Hall, i.e., the boiler explosion which caused the death of the respondent's husband; these claims are set out in the by-law, and the payment to "the widow and seven infant children of Napoleon St. Denis, deceased," of \$3,000, is provided for.

The by-law, however, contains a provision that no part of the \$7,800 "shall be paid out or disbursed to the respective claimants therefor until the Board of Control . . . shall have been first satisfied that all damage claims of every kind and nature, including all claims arising as well from loss of life and from personal injuries, as from loss of, or damage to, stock, or for damages sustained by exhibitors, made as a result of the said boiler explosion at Howick Hall, have been released and discharged as well against the Corporation of the City of Ottawa as against the Central Canada Exhibition Association and the Eastern Ontario Live Stock and Poultry Association."

The by-law also provides that "neither the passing of this by-law nor the payment of the said sum of money, or of any part thereof is to be, or is to be construed to be, an admission that the corporation of the said city are in anywise liable in law to make payment to any of the said claimants."

When Mr. Lemieux accepted, as he says he did, the offer of \$3,000 in settlement of the respondent's claim, is not shewn, and there is nothing to indicate that he accepted it subject to the qualification which the by-law contains, and there was not therefore, I think, at any time a concluded bargain "that the claim should be settled for \$3,000" binding on both parties. It is somewhat singular that, although later letters referring to the settlement were put in at the trial, the letter which Mr. Lemieux says he wrote agreeing to take \$3,000 in settlement of the claim of the respondent was not put in, nor was any reason assigned for not putting it in.

In addition to this, no settlement could properly be made without the sanction of the Court, because the rights of the seven infant children of the deceased were involved.

In my view, therefore, the appellants failed as to the alleged settlement.

It was further argued for the appellants that the deceased was a servant or employee of the association, and that, the negli-

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gence found being, as was contended, that of a fellow-servant, the action did not lie. No such defence is set up by the appellants in their pleading, and no question as to it was put, or asked, at least specifically, to be put, to the jury. The proper conclusion upon the undisputed evidence is, that the deceased was a partner of a man named Hilliard with whom the appellants had entered into a contract for the killing and dressing of such cattle as the appellants desired to have dressed, and who was in no sense the servant of the appellants, and that the deceased met with his death while engaged in carrying out this contract.

There remains to be considered the question whether the findings of the jury mean that, in their opinion, the appellants or their superintendent, Davitt, were guilty of negligence which caused the death of the deceased; and, if that is their meaning, there was evidence to warrant the findings.

In order to determine this question, four of the findings have to be considered.

The first finding is, that "the explosion which resulted in the death of the plaintiff's husband was the result of negligence and not of pure accident."

The third finding is, that the negligence which caused the explosion was the negligence of the appellants.

The fourth finding is, that that negligence consisted "in the fact that the Eastern Ontario Live Stock and Poultry Association continued to operate the boiler knowing that the safety valve was not working properly."

And the eighth finding, in answer to the question, "Did the defendant association, the Eastern Ontario Live Stock and Poultry Association, employ a competent superintendent?" is: "Yes. However, we believe that Mr. Davitt made an error of judgment in allowing the engineer to continue to operate the boiler after the second steam gauge had been applied for a test, and there was still shewn a serious discrepancy between the safety valve and the steam gauge."

In order to understand these findings, it is necessary to mention some of the facts.

It is not disputed that the engineer in charge of the boiler found that there was a serious discrepancy between the indications of the steam gauge and the working of the safety valve, and

that the same discrepancy existed when a new steam gauge was substituted for the one that had been in use. There was also evidence that the explosion occurred through a very high pressure being on, and that this was indicated by the result of the explosion. It is true that a witness who said this, and other witnesses, say that the explosion might have occurred with a pressure of only forty pounds if there had been some other defect in the boiler. Of this there was no evidence, and, according to Mr. White's argument, an examination of the boiler or the remains of it after the explosion failed to disclose anything in the condition of the boiler that would account for it. The case is not unlike *McArthur v. Dominion Cartridge Co.*, [1905] A.C. 72. In this case, as in that, there was no other reasonable explanation of the mishap than that it was occasioned by the negligence charged, and found by the jury.

Inasmuch as the deceased was not a servant of the appellants, no question of common employment arises, and the appellants are liable if the explosion was caused by the negligence of their servant, acting in the course of his employment, and not only for the negligence of the superintendent Davitt, but also for that of the engineer who had the immediate charge of the boiler when the explosion occurred.

The jury's answers, taken together, amount, I think, to a finding of negligence on the part of Davitt, and there was evidence to warrant that finding. The fact that the safety valve and the indication on the steam gauge did not correspond was brought to his attention by the engineer, as well as the fact that there was the same result when the new steam gauge was substituted, and the jury may well have come to the conclusion that Davitt should have known from this that there was something wrong with the boiler and have taken steps to find out what it was, and to remedy the defect, and that he was negligent because he did not do this, but permitted the boiler to be operated in its defective condition.

If the finding of negligence does not include a finding that the engineer was negligent, we ought to supplement the findings of the jury by making that finding.

It is warranted by the evidence, and is the necessary corollary of the finding as to Davitt, because what was notice to him of a defect in the boiler was notice also to the engineer, who evidently

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thought the matter serious, and called Davitt's attention to it, and, though the defect was not remedied, continued to operate the boiler. If the engineer was a fit man to be entrusted with the operation of it, he must have known that it was dangerous to operate it in the condition in which it was.

I would, for these reasons, affirm the judgment and dismiss the appeal with costs.

Appeal dismissed.

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Examination for Discovery in County Court Action—Application for Removal into Supreme Court—Jurisdiction of Examiner—Ministerial Act—Judgment in County Court—Removal of Record—Impossibility of Proceeding upon—Discretion—Advantage—Solicitor—Disputed Retainer

—*Remedy.*—*Certiorari* will not lie to remove any but a judicial act.—The Court will not remove a record upon which it cannot proceed.—In an action in a County Court, the plaintiff, upon his examination by the defendants for discovery, said that the action was brought without his authority, by a solicitor assuming to act for him. This statement was read at the trial, and upon it judgment dismissing the action was pronounced; there was no appeal from the judgment. The solicitor who had brought the action, contending that the examination for discovery was taken by a Special Examiner without authority or jurisdiction, moved for a *certiorari* to remove it into the Supreme Court for the purpose of having it quashed:—*Held*, that what was sought to be removed was a mere ministerial act of an officer of the Court, and it was immaterial whether he had or had not authority to do the act.—(2) That, if the record, with the judicial act of dismissal of the action, were removed—assuming that the examination would be removed with it—the Court could do nothing with the judgment; it was the judgment of a Court of competent jurisdiction, properly seized of the case.—(3) That, after judgment, there is a judicial discretion to grant or refuse a *certiorari*; and in this case there would be no advantage in having the examination before the Supreme Court—the County Court had the same power over the proceedings as the Supreme Court would have if they were removed.

—(4) That, even if the examination were quashed, no advantage would be gained by the applicant.—*Per MEREDITH, C.J.C.P.*:—The solicitor had come for redress into the wrong Court. If there were any irregularity or impropriety in any of the proceedings, any motion respecting them should be made in the County Court; and the dispute as to the solicitor's retainer should be settled by an action in a Division Court, or by summary application to the County Court if collusion between the plaintiff and defendants was charged. *Re Elliott v. McLennan*, 573.

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*Marriage Act, R.S.O. 1914, ch. 148, sec. 36—Ultra Vires—British North America Act, 1867, secs. 91(26), 92(12)—Solemnisation of Marriage—Jurisdiction of Supreme Court of Ontario—Action for Declaration of Invalidity of Marriage—Effect of sec. 15 of Marriage Act—Consent—Directory Provision—Restriction on Right to Marry.]—Everything which is included in the solemnisation of marriage is, by sec. 92 (12) of the British North America Act, excepted from the exclusive jurisdiction to legislate as to marriage which, by sec. 91(26), is vested in the Parliament of Canada.—*In re Marriage Legislation of Canada*, [1912] A.C. 880, followed.—The Ontario Marriage Act, R.S.O. 1914, ch. 148, does not make the consent required by sec. 15 a condition precedent to the formation of a valid marriage—the provisions of sec. 15 are merely directory.—*Rex v. Inhabitants of Birmingham* (1828), 8 B. & C. 29, followed.—*Semble*, apart from auth-*

ority, that the provision requiring consent is *ultra vires*, as in effect a restriction upon the right to marry of a person under the age of 18 years.—And *held*, that sec. 36 of the Marriage Act, which purports to give the Supreme Court of Ontario power to declare and adjudge that a valid marriage was not effected or entered into, where one of the parties was under the age of 18 years, and the consent required by sec. 15 was not given, is *ultra vires* of the Ontario Legislature.—Opinion of MEREDITH, C.J. C.P., 54 O.L.R. 121, approved. *Peppiatt v. Peppiatt*, 427.

2. *Roman Catholic Separate Schools*—5 Geo. V. ch. 45 (O.)—*Intra Vires*—*Suspension of Right of Trustees to Manage Schools*—“*Right or Privilege with Respect to Denominational Schools*”—*Legislation Prejudicially Affecting*—*British North America Act, 1867, sec. 93 (1)*—*Rights of Minority of Separate School Supporters—Remedy—Forum.*—The only “right or privilege with respect to denominational schools” (British North America Act, sec. 93 (1)) which the Roman Catholics had by law in the Province of Ontario at the Union was the right or privilege, so long as a system of compulsory free primary education existed, to establish, manage, and maintain Separate Schools for the education of their children and to be exempt from contributing to the support and maintenance of the Common Schools while they continued to be supporters of the Separate Schools.—The “Act

respecting the Board of Trustees of the Roman Catholic Separate Schools of the City of Ottawa," 5 Geo. V. ch. 45, does not, within the meaning of sec. 93 (1), prejudicially affect any right or privilege with respect to denominational schools which the class of persons called Roman Catholics had by law at the Union, and is *intra vires*. All that is done by the Act is to suspend the right of a particular body of persons of the class to manage its schools, because it persistently refuses to obey the law and insists upon managing them contrary to law and in open defiance of it.—Review of the legislation respecting Separate Schools in Upper Canada and Ontario.—Judgment of MEREDITH, C.J.C.P., 34 O.L.R. 624, affirmed. *Ottawa Separate School Trustees v. City of Ottawa*, *Ottawa Separate School Trustees v. Quebec Bank*, 485.

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CONTRACT.

1. *Erection of Building—Right of Contractor to Appropriate Stone Taken out in Excavating for Foundations—Conversion—Tort—Counterclaim—Costs—Absence of Concrete Footings—Allowance against Contract Price—Construction of Contract—Finding of Trial Judge—Appeal.*—The plaintiffs, contractors for the building of a school-house, in excavating for the foundations, took out of the defendants' land a quantity of stone, and sold it as their own. No custom or usage was proved, and there was nothing in the evi-

dence nor in the contract or specifications which threw much light upon the matter. The specifications shewed that excavated earth was to remain the property of the defendants; it was also provided that the plaintiffs were to keep trimmed up in piles all materials delivered to the work "and all refuse, rubbish, and other materials not removed;" and, further, that the plaintiffs should promptly remove all materials rejected and all rubbish:—*Held* (MEREDITH, C.J.O., dissenting), that the plaintiffs were not entitled to remove the stone, and were liable to the defendants for the value thereof—no intention on the part of the defendants to abandon it being deducible from the evidence or the circumstances. — *Robinson v. Milne* (1884), 53 L.J. Ch. 1070, and *Elwes v. Brigg Gas Co.* (1886), 33 Ch.D. 562, distinguished.—The trial Judge's finding as to concrete footings was affirmed.—It was *held*, that the defendants should have been allowed the costs of their counterclaim, upon which they recovered \$178.45, on the District Court scale: the conversion of the stone was a tort, and the defendants did not waive it by adopting as the measure of their damages the amount for which it was sold. *McLeod v. Sault Ste. Marie Public School Board*, 415.

2. *Installation of Heating System in House—Failure to Heat House as Agreed—Action for Balance of Price—Counterclaim for Moneys Paid on Account—Return of Heating Fixtures—Use of Fix-*

tures—*Compensation for Breach of Contract.*]—The plaintiff, under an agreement with the defendant, installed a heating system in the defendant's house, and sued for a balance of the price; the defendant set up that the system installed was useless, and the material must be "scrapped:"—*Held*, that the plaintiff's contract was, to put into the defendant's house a heating system that would properly heat it, and there was evidence to sustain the finding of the trial Judge that that had not been done; the result was, that the plaintiff had not furnished what he agreed to furnish, and was not entitled to the price.—But *held*, that the defendant was not entitled to retain the fixtures—the boiler, radiators, pipes, etc.—put in by the plaintiff; they were the property of the plaintiff.—*Munro v. Butt* (1858), 8 E. & B. 738, and *Oldershaw v. Garner* (1876); 38 U.C.R. 37, distinguished. — The plaintiff should be allowed to remove the fixtures, doing no unnecessary damage, upon paying to the defendant the amount of his judgment and costs.—The defendant's use of the heating system, such as it was, for two seasons, was sufficient to compensate him for the plaintiff's breach of the contract.—*Forman v. The Ship "Liddesdale,"* [1900] A.C. 190, and *Dakin & Co. Limited v. Lee* (1914), 84 L.J.Q.B. 894, referred to. *Brazeau v. Wilson*, 396.

3. *Municipal Corporation — Oral Agreement for Lease of Land — Possession Taken and Gravel*

Removed — Part Performance — Statute of Frauds—Specific Performance—Completed Agreement —Term as to Survey and Preparation of Lease—Corporate Seal—Municipal Act, R.S.O. 1914, ch. 192, sec. 249.]—Specific performance of an oral agreement for a lease by the defendant to the plaintiffs, a municipal corporation, of land with the right to take gravel therefrom, was adjudged, where there were acts of part performance by the plaintiffs in taking possession of the land and removing gravel from it, with the knowledge and consent of the defendant, which took the case out of the Statute of Frauds. In the eye of a Court of Equity, it is a fraud to set up the absence of agreement when possession has been given on the faith of it.—*Wilson v. West Hartlepool R.W. Co.* (1865), 2 DeG. J. & S. 475, and *Parker v. Taswell* (1858), 2 DeG. & J. 559, followed.—The agreement was not incomplete by reason of a term that a "survey or description" of the land which was the subject of the agreement should be made and a lease prepared by the plaintiffs' clerk.—For the same reason that the defendant was precluded by acts of part performance from setting up the Statute of Frauds, the plaintiffs were prevented from setting up the absence of a seal to two resolutions of their council authorising the making of the lease. The rule that part performance will prevent a company from setting up a defence grounded on the absence of a corporate seal, applies in the case of a municipal

corporation, notwithstanding sec. 249 of the Municipal Act, R.S.O. 1914, ch. 192, providing for the exercise by by-law of the powers of a municipal council; and the defendant could not, on that ground, maintain that there was no agreement.—*Waterous Engine Works Co. v. Town of Palmerston* (1892), 21 S.C.R. 556, distinguished. *Township of King v. Beamish*, 325.

4. *Purchase and Sale of Timber—Oral Agreement—Subject-matter—Whole of Season's Cut—Property Passing—Acceptance of Timber—Appropriation to Contract—Time for Delivery—Finding of Trial Judge—Appeal.*—In an action for the price of timber cut and taken out by the plaintiff during the season of 1913-1914, under an agreement, not in writing, for the purchase thereof by the defendant, the plaintiff alleged that what he sold and what the defendant bought was the whole of his cut; while the defendant asserted that he agreed to buy only so much of the cut as was passed down stream into a certain lake in the season of 1914:—*Held* (MAGEE and HODGINS, JJ.A., dissenting), that, on the evidence, the defendant intended to buy and did buy the whole of the cut; and that the effect of what took place—the inspection, measuring, and branding of the cut—was to pass the property in the whole to the defendant as finally appropriated and accepted under the contract.—*Wilson v. Shaver* (1901), 3 O.L.R. 110, and *Craig v. Beardmore* (1904), 7 O.L.R. 674, fol-

lowed. — Both parties assumed that delivery would be completed in the season of 1914, but there was no definite bargain with regard to the time of delivery; the law implied a duty to perform within a reasonable time; the final delivery made by the plaintiff in 1915 was, in the circumstances, made within a reasonable time; and the plaintiff was entitled to the price of the whole cut. — *Tarling v. O'Riordan* (1878), 2 L.R. Ir. 82, *Gilmour v. Supple* (1858), 11 Moore P.C. 551, 566, and *Calcutta and Burmah Steam Navigation Co. v. De Mattos* (1863-4), 32 L.J.Q.B. 322, 33 L.J.Q.B. 214, specially referred to by HODGINS, J.A., who *held* that the contract was treated as if separable, and each delivery dealt with by itself, the defendant having and exercising a right to reject. *White v. Greer*, 306.

5. *Statute of Frauds—Husband and Wife—Promise of Wife to Pay Debt of Husband—Consideration—Oral Guaranty—Judgment Recovered against Husband—Finding of Joint Primary Liability—Reversal on Appeal.*—The plaintiff sued two defendants, husband and wife, for the balance of the price of goods sold by the plaintiff to the husband. It appeared that the plaintiff threatened to stop the goods *in transitu* if the price was not paid, that the wife then orally promised the plaintiff to pay, and that the plaintiff did not carry out her threat. The plaintiff obtained in this action judgment against the husband for the

amount sued for:—*Held*, that what the wife promised to pay was the debt of her husband; and, while the promise and the consideration were shewn, the promise, not being in writing, did not satisfy the Statute of Frauds, and was not enforceable.—*Beard v. Hardy* (1901), 17 Times L.R. 633, *Davys v. Buswell*, [1913] 2 K.B. 47, 53, 54, and *Young v. Milne* (1910), 20 O.L.R. 366, specially referred to. *Jeffrey v. Aylea*, 391.

See GUARANTY — INDEMNITY — INFANTS, 1 — INSURANCE — MARRIED WOMAN—MECHANICS' LIENS — MUNICIPAL ELECTIONS — PARENT AND CHILD—PARTIES, 1, 2—PRINCIPAL AND AGENT—SALE OF GOODS—TRUSTS AND TRUSTEES—VENDOR AND PURCHASER, WILL, 3.

CONTRIBUTION.

See WILL, 2.

CONTRIBUTORY NEGLIGENCE.

See NEGLIGENCE, 3.

CONVERSION.

See CONTRACT, 1.

CONVICTION.

See CRIMINAL LAW — LIQUOR LICENSE ACT.

CORPORATION.

See MUNICIPAL CORPORATIONS.

CORROBORATION.

See CRIMINAL LAW, 1—EXECUTORS AND ADMINISTRATORS.

COSTS.

See APPEAL — CONTRACT, 1 —

LANDLORD AND TENANT, 1 — LIQUOR LICENSE ACT, 3—MUNICIPAL CORPORATIONS, 3—PARENT AND CHILD—TRADING WITH THE ENEMY.

COUNTERCLAIM.

See CONTRACT, 1, 2.

COUNTY COURTS.

See APPEAL — CERTIORARI — MARRIED WOMAN.

COURTS.

See APPEAL—DIVISION COURTS.

COVERTURE.

See MARRIED WOMAN.

CRIMINAL LAW.

1. *Carnal Intercourse with Young Girl — Criminal Code, secs. 210, 211, 1002 (c) — Two Offences—Acquittal on First — Corroboration by Evidence of Second Offence—Proof of Previous Unchastity of Prosecutrix—Evidence as to first Offence—Evidence relating to other Occasions.* —The defendant was charged, first, with having had illicit connection with the prosecutrix, a girl of previously chaste character, between fourteen and sixteen years of age, on the 15th December, 1914; and, second, with having had illicit connection with the same girl, described as before, in or about the month of May, 1915. The defendant was acquitted on the first count, and found guilty upon the second:—*Held*, that the trial Judge was right as a matter of law in rejecting evidence of what took place in May as corroboration of the evidence of the prose-

cutrix as to what took place in December.—*Held*, also, that the trial Judge was not bound to find, in regard to the second charge, that the prosecutrix was not of previously chaste character in May, merely because of her own testimony that she had in December had carnal connection with the defendant: see secs. 210, 211, and 1002 (c) of the Criminal Code.—*Held*, also, that a contention raised by the defendant upon a passage in the evidence, indicating that there had been other acts of carnal intercourse, should not prevail; the onus of proving previous unchastity being upon the defendant, and the passage referred to being of doubtful meaning. *Rex v. Farrell*, 372.

2. *Conspiracy — Evidence — Opinion of Trial Judge in Civil Action as to Veracity of Accused — Inadmissibility — Reasons for Judgment not Given in Presence of Accused — Cross-examination of Accused — Hearsay Evidence — Res Judicata — Opinion Evidence — Evidence as to Unveracity Based on Single Incident — Judge's Charge — Misdirection — Substantial Wrong or Miscarriage — Criminal Code, sec. 1019 — New Trial.*]
—The defendant was tried and convicted upon a charge of conspiring with G. and others to prosecute S. for an alleged offence, knowing S. to be innocent thereof. Before the charge was made, a civil action, to which the defendant and S. were parties, was tried, and the trial Judge, in written reasons for judgment, given when the defendant was not present, ex-

pressed an opinion unfavourable to the veracity of the defendant. At the defendant's trial on the criminal charge, he testified on his own behalf; and, on cross-examination by counsel for the Crown (against the objection of the defendant's counsel), the defendant was shewn a report of the written reasons above referred to, and was required to answer questions as to his knowledge of the Judge's remarks. The Judge who presided at the criminal trial, in charging the jury, referred to the defendant's admission as to the opinion of him entertained by the Judge who tried the civil action, and told the jury to consider that, when determining whether the defendant was to be believed as against witnesses who had contradicted him:—*Held* (MAGEE, J.A., dissenting), that the passage from the reasons for judgment above mentioned was not admissible in evidence, and the Judge at the criminal trial was wrong in charging the jury in the manner above stated.—*Henman v. Lester* (1862), 12 C.B.N.S. 776, and *Houstoun v. Marquis of Sligo* (1885), 29 Ch.D. 448, distinguished.—*Held*, also (MAGEE, J.A., dissenting), that it could not be said that no substantial wrong or miscarriage was occasioned by the improper admission of the evidence: Criminal Code, sec. 1019; and there should be a new trial. *Rex v. Baugh*, 436.

3. *Disposing of Trading Stamps — Criminal Code, secs. 335 (u), 505 — Voting Contest for Prize —*

Ticket Given to Purchaser of Goods—"Premium."—The giving of a ticket by a merchant or dealer in goods to a purchaser of goods, which ticket gives the purchaser a right to contest for, and to aid himself in a voting contest for, a prize, or to aid some one else in that contest, and also to sell his rights under the ticket, is the giving of a "premium" within the meaning of sec. 335 (u) of the Criminal Code, defining "trading stamps;" and it was held, that the accused was properly convicted under sec. 505 for giving or disposing of tickets of the kind described to a merchant or dealer in goods for use in his business. *Rex v. Pollock*, 7.

4. *Incest — Sexual Intercourse with Daughter — Evidence—Proof of Marriage—Proof of Penetration and Emission—Wife of Prisoner not Called as Witness—Comment of Crown Counsel—Conviction — New Trial.*—Upon the trial of the prisoner for incest, counsel for the Crown, in his address to the jury at the close of the case, commented on the fact that the prisoner's wife had failed to testify. The prisoner was convicted:—*Held*, that, by reason of the comment, the conviction was void, and there should be a new trial.—(2) That formal proof of the marriage of the prisoner with the mother of the girl, alleged to be the prisoner's daughter, with whom he committed the offence, was not necessary to sustain the conviction.—(3) That the testimony of a person who swore she saw the prisoner having sexual intercourse with his daughter

was, without any evidence as to penetration or the emission of seed, sufficient to sustain the conviction. *Rex v. Lindsay*, 171.

5. *Search-warrant — Canada Temperance Act, R.S.C. 1906, ch. 152, sec. 136—Information—Failure to Disclose Facts Shewing Causes of Suspicion — Order Quashing Warrant—Condition as to Bringing Action.*—An information sworn to by an Inspector under the Canada Temperance Act, R.S.C. 1906, ch. 152, stated merely that the informant "hath just and reasonable cause to suspect and doth suspect that intoxicating liquor is kept for sale," in violation of the Act, by the defendant. Upon this a search-warrant was issued by a Police Magistrate, under sec. 136 of the Act:—*Held*, that, as the information did not disclose facts and circumstances shewing the causes of suspicion, the warrant issued thereupon must be deemed to have been improperly issued, and must be quashed; the order quashing to contain a condition to the effect that no action should be brought against the Police Magistrate or against any officer acting on the search-warrant to enforce the same.—*Rex v. Kehr* (1906), 11 O.L.R. 517, followed. *Rex v. Bender*, 378.

6. *Theft — Conviction — Police Magistrate for City—Jurisdiction — Place of Offence—Place of Residence of Accused—Criminal Code, sec. 577—Railway Conductor — Appropriation of Money Received from Passenger — Evidence — Penalty—Fine—Authority to Im-*

pose—*Criminal Code*, secs. 773 (a), (b), 777 (5), 780, 1035, 1044.]

—The defendant, residing in the city of Toronto, was charged before the Police Magistrate for the city and convicted, upon summary trial, for theft. The defendant was conductor of a railway train running from Stratford to Toronto, and the offence consisted in accepting a sum of money from a passenger for fares and retaining the greater part of the sum received, while paying over a small portion to the company:—*Held*, that, although it did not appear that the offence was committed within the city of Toronto, the Police Magistrate had jurisdiction under sec. 577 of the *Criminal Code*.—(2) That there was evidence before the magistrate upon which the conviction for theft could be properly made.—*Rex v. McLellan* (1905), 10 Can. Crim. Cas. 1, followed.—*Rex v. Thompson* (1911), 21 Can. Crim. Cas. 80, not followed.—(3) That the penalty imposed, viz., a fine of \$100, was within the authority of the magistrate.—Sections 773 (a), (b), 777 (5), 780, 1035, and 1044 of the *Criminal Code* considered. *Rex v. Sinclair*, 510.

See LIQUOR LICENSE ACT.

CROWN COUNSEL.

See CRIMINAL LAW, 4.

CUSTODY OF INFANTS.

See INFANTS.

DAMAGES.

See LANDLORD AND TENANT, 1
—LIBEL, 2—NEGLIGENCE, 3—

PARENT AND CHILD — VENDOR AND PURCHASER.

DEATH.

See HIGHWAY, 4 — NEGLIGENCE, 1, 2, 3.

DEFAMATION.

See LIBEL.

DEVIATION.

See HIGHWAY, 1.

DEVISE.

See WILL.

DEVOLUTION OF ESTATES ACT.

See WILL, 3.

DISCOVERY.

See CERTIORARI—LIBEL, 1.

DISCRETION.

See CERTIORARI—INFANTS, 2
—LIBEL, 1—MORTGAGE, 2.

DISQUALIFICATION.

See MUNICIPAL ELECTIONS.

DISTRESS.

See LANDLORD AND TENANT, 2.

DISTRICT COURTS.

See APPEAL.

DIVISION COURTS.

Action Dismissed in Absence of Plaintiff — Mistake of Clerk — Judgment — Nullity — Division Courts Act, R.S.O. 1914, ch. 63, secs. 79 (2), 123—Prohibition.—A Division Court plaint having been transferred from the Seventh Division Court to the Tenth, the Clerk of the latter Court, on the 14th May, 1915, sent a notice to the plaintiff (sec.

79 (2) of the Division Courts Act, R.S.O. 1914, ch. 63) that the court-day was the 27th May. The case, however, was put on the list for the 20th May, without further notice to the plaintiff; on that day, the case was called, and, no one appearing, it was dismissed. After the lapse of several months, but as soon as the dismissal came to the plaintiff's knowledge, he applied to the Division Court Judge, who treated the dismissal as a nullity:—*Held*, properly so; and a motion for prohibition was refused.—The case did not fall within sec. 123 of the Act, which limits the time for applying for a new trial.—*Re Nilick v. Marks* (1900), 31 O.R. 677, distinguished. — *Keating v. Graham* (1895), 26 O.R. 361, 377, and *Hammond v. Schofield*, [1891] 1 Q.B. 453, 455, followed. *Re Arnold v. Cook*, 504.

DOMICILE.

See INSURANCE, 2.

EASEMENT.

See TITLE TO LAND.

ELECTION.

See VENDOR AND PURCHASER.

ELECTIONS.

See MUNICIPAL ELECTIONS.

ELECTRIC COMPANY.

See INDEMNITY—NEGLIGENCE,
1.

ENDOWMENT CERTIFICATE.

See INSURANCE, 4.

ENEMY.

See TRADING WITH THE ENEMY.

EQUITABLE RIGHTS.

See LIMITATION OF ACTIONS, 2.

ESTATE.

See WILL.

ESTOPPEL.

See MARRIED WOMAN—PRINCIPAL AND AGENT.

EVICTIION.

See LANDLORD AND TENANT, 1.

EVIDENCE.

Title to Land — Possession — Presumption of Ownership—Rebuttal—Acts and Conduct of Predecessor in Title—Admissibility—Misrepresentation — Failure to Prove.]—Statements by persons in possession of property qualifying or affecting their title thereto are receivable against a party claiming through them by title subsequent to the admissions; and the acts and conduct of a predecessor in title inconsistent with the existence in him of a right or title which a person who derives title from him is asserting, are also receivable.—It was *held*, in this case, which concerned a dispute as to the ownership of a strip of land, that the acts and conduct of the third party, the defendant's grantor, were receivable in evidence against the defendant; and that they, at all events when taken in connection with other circumstances, displaced the presumption of ownership arising from the defendant's possession of the strip, and entitled the plaintiff to succeed.—*Held*, also, that the defendant had failed to establish any misrepresentation by the

third party as to the extent of the land that he conveyed to the defendant. *Taylor v. Vanderburgh*, 337.

See CRIMINAL LAW, 1, 2, 4, 6—
EXECUTORS AND ADMINISTRATORS—LIQUOR LICENSE ACT, 1, 2, 3—MUNICIPAL ELECTIONS—
NEGLIGENCE, 3—NUISANCE—
TITLE TO LAND—TRADING WITH
THE ENEMY.

EXCAVATION.

See CONTRACT, 1—LAND.

EXCESSIVE DAMAGES.

See LIBEL, 2.

EXECUTION CREDITORS.

See MORTGAGE, 3.

EXECUTORS AND ADMINISTRATORS.

Claim against Executors of Deceased Person—Promise to Pay Sum of Money in Addition to Sum Paid in Settlement of Action—Evidence—Corroboration—Evidence Act, sec. 12—Failure to Establish Binding Promise—Stale Claim—Consideration—Uncertainty—Statute of Frauds—Parties—Administrator—Executors de son Tort—Practice—Statute of Limitations.—In 1909, an action was brought by the present plaintiff and his two brothers against several defendants; one of the defendants was a company in which C. was largely interested; in November, 1909, a settlement of that action was effected, the plaintiffs being paid \$3,800 in satisfaction of all their claims. C. died in November, 1913; and this action was begun in Sep-

tember, 1914, to recover from the estate of C. the sum of \$1,000 which, it was said, the plaintiff and his brothers were to receive from C., in addition to the \$3,800, for settling their claims in the former action. The claim was based upon a promise, not in writing, alleged to have been made by C., at the time of the settlement of the former action, to the solicitor for the plaintiffs in that action; the solicitor, at the trial of this action, testified that the promise was made, and his testimony was to some extent corroborated, as the trial Judge found, by the testimony of the solicitor who had acted for the defendants in the former action:—*Held* (RIDDELL, J., dissenting), that no binding promise was proved to have been made or was intended to have been made. —*Hill v. Wilson* (1873), L.R. 8 Ch. 888, and *In re Garnett* (1885), 31 Ch.D. 1, referred to. *McEwan v. Toronto General Trusts Corporation*, 244.

See WILL, 3.

EXPLOSION.

See NEGLIGENCE, 2.

EXPROPRIATION.

See MUNICIPAL CORPORATIONS, 3.

FAIR COMMENT.

See LIBEL, 1.

FATAL ACCIDENTS ACT.

See NEGLIGENCE, 2.

FINE.

See CRIMINAL LAW, 6.

FIRE INSURANCE.

See MORTGAGE, 3.

FIXTURES.

See CONTRACT, 2.

FLOATABLE STREAM.

See WATER.

FORECLOSURE.

See MORTGAGE, 1.

FORFEITURE.

See LANDLORD AND TENANT, 1
—VENDOR AND PURCHASER.

FRAUD AND MISREPRESENTATION.

See EVIDENCE — PRINCIPAL
AND AGENT—TRUSTS AND TRUSTEES.

FURNISHED THEATRE.

See LANDLORD AND TENANT, 3.

GUARANTY.

Substituted Agreement — Increase in Liability — Knowledge and Acquiescence of Guarantor — Binding Effect.—Held, affirming the judgment of HODGINS, J.A., 34 O.L.R. 639, that the defendant was not released from his guaranty, the substituted agreement, by certain changes and transactions of which he complained, he having had knowledge of these things and having acquiesced in them when he gave the guaranty, and having by his conduct ratified them afterwards. *K. and S. Auto Tire Co. Limited v. Rutherford*, 26.

See CONTRACT, 5 — SALE OF GOODS.

GUARDIAN.

See LIMITATION OF ACTIONS, 2.

HABEAS CORPUS.

See LIQUOR LICENSE ACT, 1.

HEARSAY.

See CRIMINAL LAW, 2.

HIGHWAY.

1. *Line Between Townships — "Deviation"—Road wholly within one Township—"Laid out and Opened"—Intention—Municipal Act, R.S.O. 1914, ch. 192, sec. 458.*—The judgment of CLUTE, J., declaring that a certain road lying wholly within the township of Euphrasia was a deviation from the town-line between Euphrasia and St. Vincent, with- in sec. 458 of the Municipal Act, R.S.O. 1914, ch. 192, and that both township corporations were responsible for its maintenance, was reversed by a Divisional Court on appeal. *Township of Euphrasia v. Township of St. Vincent*, 233.

2. *Nonrepair — Injury to Traveller—Actionable Negligence of Municipal Corporation—Failure to Give Notice of Claim and Injury in Time—Reasonable Excuse for Delay—Prejudice to Corporation—Municipal Act, R.S.O. 1914, ch. 192, sec. 460 (4), (5).*—The plaintiff was injured by a fall upon a sidewalk found to be out of repair by reason of actionable negligence on the part of the defendants, an urban municipality. The plaintiff brought this action to recover damages for her injuries; but the notice required by sec. 460 (4) of the Municipal

Act, R.S.O. 1914, ch. 192, to be given within seven days after the injury, was not given until nearly a month after it. The plaintiff's excuse (under sec 460 (5)) for not giving the notice in time was, that she believed the injury was only a sprained ankle, and that, although she suffered great pain, which, she alleged, incapacitated her from giving notice, she did not contemplate bringing an action until—more than three weeks after the injury—she consulted a doctor, who found that there was a fracture of the fibula and another injury. Notice was at once given to the defendants, and the action was begun:—*Held*, by the trial Judge, that there was no reasonable excuse for not giving the notice in time; and, although the defendants were not prejudiced in their defence, that the action must be dismissed.—Upon appeal to a Court composed of four Judges, there was an equal division of opinion, and the judgment of MIDDLETON, J., stood as if affirmed. *Wallace v. City of Windsor*, 62.

3. *Nonrepair—Injury to Traveller — Open and Unguarded Ditch at Side of Travelled Road—Horse Shying at Motor Vehicle and Overturning Buggy and Occupant into Ditch—Duty of Township Corporation — Municipal Act, R.S.O. 1914, ch. 192, sec. 460—Reasonable Safety for Public Travel—Additional Danger from Motor Vehicles—Failure to Perform Duty—Cause of Injury.*—The plaintiff, driving in a buggy drawn by a horse, upon a township road, was injured by reason

of the horse taking fright at a motor vehicle coming in the opposite direction, shying, and overturning the plaintiff and the buggy into a ditch at the side of the road:—*Held*, that the proper conclusion upon the evidence was, that the defendants had failed to perform the duty imposed upon them by sec. 460 of the Municipal Act, R.S.O. 1914, ch. 192, of keeping the road in repair, and that the plaintiff's injuries were sustained by reason of that default.—The statutory duty imposed upon the defendants required them to make the road reasonably safe for the purposes of travel, and so safe from any additional danger incident to the use of it by motor vehicles. *Davis v. Township of Usborne*, 148.

4. *Nonrepair of Bridge — Collapse under Weight of Traction Engine—Death of Person Seated on Engine—Liability of Municipal Corporation—Traction Engines Act, 2 Geo. V. ch. 53 (R.S.O. 1914, ch. 212), sec. 5 (4)—Construction of—Failure to Perform Duty Imposed—Necessity for Laying down Planks to Protect Surface of Bridge — Identification of Deceased with Owner of Engine—Position of Deceased with Regard to Owner — Passenger.]*—The judgment of MASTEN, J., 35 O.L.R. 1, was affirmed.—*Goodison Thresher Co. v. Township of McNab* (19 8-10), 19 O.L.R. 188, 44 S.C.R. 187, considered; and *Mills v. Armstrong* (1887), 13 App. Cas. 1, *Flood v. Village of London West* (1896), 23 A.R. 530, and *Foley v. Township of*

East Flamborough (1899), 26 A.R. 43, referred to. *Linstead v. Township of Whitchurch*, 462.

See MUNICIPAL CORPORATIONS, 1, 2—RAILWAY.

HUSBAND AND WIFE.

Profits of Business of Wife Managed by Husband—Liability to Satisfy Judgment Recovered against Husband — Druggist's Business—Qualification of Husband as Registered Pharmacist—Pharmacy Act, R.S.O. 1914, ch. 164—Separate Property of Husband in Hands of Wife—Trustee—Account.—Where a man is associated with a business said to be his wife's, the question whether he is her agent, or whether the business belongs to him, is one of fact; and the test is, whether the wife is trading independently of her husband without being accountable to him for the profits of the business. The mere fact that a married woman engages the services of her husband in the management of, or as an employee in, her separate business, does not of itself entitle him to a proprietary interest in it or in its proceeds; nor are the profits which arise from his labour or skill, by the simple fact of such engagement or employment, deprived of the character of separate estate of the wife, or rendered subject to the claims of his creditors.—In this case, the husband, who was a registered pharmacist, managed for his wife, a drug and stationery business, carried on in her name, which she had purchased, paying

therefor with her own money, and money made in carrying on the business, the husband receiving from her a salary of \$10 a month, under the terms of an agreement in writing; and it was held, that a judgment creditor of the husband was not entitled to reach for his satisfaction the profits of the business except in so far as the business was the husband's, which was the case in regard to a particular class of goods dealt in; as to this the wife was a trustee for the husband.—*Laporte v. Costick* (1874), 31 L.T.R. 434, *Harrison v. Douglass* (1877), 40 U.C.R. 410, *Meakin v. Samson* (1878), 28 U.C.C.P. 355, *In re Gearing* (1879), 4 A.R. 173, and *Campbell v. Cole* (1884), 7 O.R. 127, distinguished. — *Murray v. McCallum* (1883), 8 A.R. 277, and *Baby v. Ross* (1892), 14 P.R. 440, specially referred to.—Held, also, that no distinction was to be made between the portion of the profits derived from the drug business, which the wife was not, but the husband alone was, qualified to carry on, and the profits from the rest of the business: the wife might have rendered herself liable to the penalties prescribed by the Pharmacy Act, R.S.O. 1914, ch. 164; but the proceeds of the drug business, with the one exception, were not to be regarded as the property of the husband.—*Regina ex rel. Warner v. Simpson* (1896), 27 O.R. 603, distinguished. *Walker v. Brown*, 287.

See CONTRACT, 5—INSURANCE, 3—MARRIED WOMAN — TRUSTS AND TRUSTEES.

ILLEGITIMATE CHILD.

See INFANTS, 2.

IMPRISONMENT.

See LIQUOR LICENSE ACT, 1.

IMPROVEMENTS.

See WATER.

INCEST.

See CRIMINAL LAW, 4.

INCUMBRANCES.

See INSURANCE, 3.

INDEMNITY.

Contract—Liability for Injury to Workman—Relief over—Municipal Corporation—Electric Company—Indemnity Clause—Construction.] — In a contract between an electric company and a city corporation in regard to the operations of the company in the city streets, it was provided that the company should indemnify the corporation against any action or demand brought or made by the granting of any privileges to the company, and also against all loss or damage which the corporation might incur by reason of the improper or imperfect execution of the company's works, or by reason of their becoming unsafe or out of repair, or by reason of the failure of the company to do or permit anything agreed to be done or permitted, or by reason of any act, default, or omission of the company or otherwise howsoever:—*Held*, in an action against both the company and the corporation, by the mother of a workman employed by the company, who was killed by an electric

shock when cutting a wire, assuming that the workman's rights must be limited to those of the company, and that he must be barred if the company could not sue, that the case did not fall within the indemnity clause: the corporation was made liable in the action, not by reason of anything done or left undone by the company, but by reason of the company's own negligence in changing a safe arrangement of the wires and poles into an unsafe one (*MEREDITH*, C.J.C.P., dissenting); and the same considerations applied to the claim for indemnity made by the corporation against the company.—*Sutton v. Town of Dundas* (1908), 17 O.L.R. 556, distinguished. *Lambert v. City of Toronto*, 269.

INFANTS.

1. *Custody—Abandonment by Mother—Adoption by Foster-parents—Adoption Agreements Made by Father—Application by Parents for Custody—Infants Act, R.S.O. 1914, ch. 153, sec. 3—Common Law Right—Conduct of Father Precluding Assertion of, in Equity—Interest of Infants—Rights of Foster-parents—Compensation.*]—The father of an infant cannot make a binding adoption agreement: the changes in the statute-law embodied in sec. 3 of the Infants Act, R.S.O. 1914, ch. 153, have not altered the law in this respect.—*Re Hutchinson* (1912-13), 26 O.L.R. 601, 28 O.L.R. 114, followed. — The father, however, may (in equity) by his conduct preclude himself from asserting his natural and common law right — *In re Agar-*

Ellis (1878), 10 Ch.D. 49, 72, *In re Agar-Ellis* (1883), 24 Ch.D. 317, 333, and *In re Scanlan* (1888), 40 Ch.D. 200, followed.—It was *held*, in the circumstances of this case, the children being in good foster-homes, that the father should not, against the interest of the children, be permitted to resume the custody of them merely for the purpose of handing them over to the mother; and, if the mother had any independent right, her abandonment of the children precluded her from asserting it.—*Seem*, that, if the custody of the children were awarded to the parents, it would be upon payment of a substantial sum for the expenses of the foster parents. *Re Clarke*, 498.

2. *Custody—Illegitimate Child—Rights of Mother—Interest of Infant—Foster-parents—Discretion of Judge in Chambers—Appeal.*]—The desire of the mother of an illegitimate child as to its custody is primarily to be considered and must be given effect to, unless it would be prejudicial to the child's interests if it were delivered into the custody of the mother. But the Court, acting as a wise parent, is not bound to sacrifice the child's welfare to the *fetish* of parental authority, by forcing it from a happy and comfortable home to share the fortunes of a parent, however innocent, who cannot keep a roof over its head, or provide it with the necessities of life. — *Barnardo v. McHugh*, [1891] A.C. 388, and *In re O'Hara*, [1900] 2 I.R. 232, 240,

241, followed.—Where an illegitimate child was, a few months after its birth, handed over by the mother to foster-parents, by whom it was cared for and comfortably maintained for more than six years, the mother's application to have its custody transferred to her, she having in the meantime taken no interest in the child, and being without means and without a suitable home, was, in the interest of the infant, refused by SUTHERLAND, J., in Chambers, in the exercise of his discretion; and his order was affirmed by a Divisional Court, on the mother's appeal. *Re Gefrasso*, 630.

See LIMITATION OF ACTIONS—PARENT AND CHILD.

INFORMATION.

See CRIMINAL LAW, 5—LIQUOR LICENSE ACT, 1, 3.

INJUNCTION.

See NUISANCE.

INSPECTION.

See SALE OF GOODS.

INSURANCE.

1. *Accident Insurance—Insured Injured by Reason of Jump from Moving Train—Indirect Result of Intentional Act—Voluntary or Negligent Exposure to Unnecessary Danger—Ontario Insurance Act, R.S.O. 1914, ch. 183, sec. 172 (1).*]—The plaintiff, having a ticket entitling him to be carried on a railway to K. station, deliberately took passage on a train which he knew did not stop at that station, relying upon

being able to alight at a point near there, where trains usually stopped. The train, however, did not stop at that point, and he jumped from the train, which was travelling at a speed of from 8 to 12 miles an hour, fell, and was injured:—*Held*, that he was not entitled to recover upon a policy of accident insurance; the injury was "the indirect result of his intentional act," that act "amounting to voluntary or negligent exposure to unnecessary danger." Ontario Insurance Act, R.S.O. 1914, ch. 183, sec. 172 (1).—*Dictum* of Sedgewick, J., in *Canadian Railway Accident Insurance Co. v. McNevin* (1902), 32 S.C.R. 194, not followed. *Martin v. Protective Association of Canada*, 19.

2. *Life Insurance — Benefit Certificate Issued by Ontario Society—Designation of Preferred Beneficiaries—Change of Domicile of Assured—Alteration of Designation by Change to Beneficiary of same Class—Will Executed at New Domicile—Effect of Law of Domicile — Trust — Assignment of Chose in Action—Power of Appointment—Insurance Act, R.S.O. 1914, ch. 183, secs. 171 (3), (5), 177 (4), 178, 179—Effect of Prior Known Decision—Judicature Act, R.S.O. 1914, ch. 56, secs. 32, 43 (2).]*—An Ontario benevolent society in 1890 issued to B., then domiciled in Ontario, a benefit certificate for \$2,000, which provided that this sum should, upon his death, be paid to his three children equally. B. subsequently changed his residence and domicile to the State of New

York, and died there in 1915. The policy or certificate was in force at the time of his death. By his will, made in that State, shortly before his death, he provided as follows: "I give devise and bequeath to my granddaughter C. W. all my life insurance that I may have and in force at the time of my death." The will was duly executed according to the laws of Ontario and New York; but, according to the law of the State of New York, beneficiaries in an insurance policy cannot be changed by will:—*Held*, that a valid change of beneficiaries was made by the will, and that the \$2,000 should be paid to the grandchild.—Section 171 (3) and (5) of the Insurance Act, R.S.O. 1914, ch. 183, *Lee v. Abdy* (1886), 17 Q.B.D. 309, and *Toronto General Trusts Co. v. Sewell* (1889), 17 O.R. 442, considered. *Re Baeder and Canadian Order of Chosen Friends*, 30.

3. *Life Insurance — Contracts Made with Wife of Subject of Insurance—Absolute Property of Wife—Contracts by Insured for Benefit of Wife—Will of Insured—Beneficiary Cut down to Life Interest—Change of Beneficiary of Corpus within Preferred Class—Effective Designation — Codicil — Effect of—Predecease of Wife—Payment of Incumbrances—Ontario Insurance Act, R.S.O. 1914, ch. 183, secs. 169, 171 (3), (5), 178 (1), (2), (7).]*—There were six policies of insurance on the life of the testator. One of them was effected by the testator's wife upon his life; another was effected by the testator for the

benefit of his wife, but the insurers promised and agreed to and with the said assured, *her* executors . . . to pay to the said assured, *her* executors, etc.:—*Held*, that these two policies were the property of the wife, and were not affected by any declaration made by the husband: sec. 169 of the Ontario Insurance Act, R.S.O. 1914, ch. 183.—The other four policies being effected by the testator for the benefit of his wife, in respect of them a trust was created in favour of the wife (sec. 178 (2)), unless and until a declaration should be made under sec. 171 (3), and in no case could the policies be diverted from the class of preferred beneficiaries except under sec. 178 (7).—By his will, the testator gave and devised all his real and personal estate to his “executor in trust for the use of my wife . . . during her natural life . . . my said executor to collect all the life insurance, rents, interest and accounts . . . and with this money first pay off the incumbrances . . . on my real estate. . . . My executor must keep the different buildings in . . . repair and insured, and pay, out of the balance of rents and interest, all or any portion thereof to my said wife for her own use or maintenance . . .” The testator then made devises of three parcels of land after the death of his wife, and certain specific bequests. There was then the residuary clause: “All the rest residue and remainder of my property real and personal I give and devise to my daughter.”

After the death of his wife, the testator executed a codicil, in which he recited the fact of her death, and said, “The portion of my said will referring to her will no longer be operative:”—*Held*, that the words of the will were sufficient, under sec. 171 (5) of the Act, to take away from the wife the corpus of the proceeds of the policies and to cut her down to a life interest in those proceeds, and to change the beneficiary to the daughter, who was also within the preferred class (sec. 178 (1)).—The words of the codicil did not affect the declaration of the will in favour of the daughter.—The case did not come under sec. 178 (7), as the beneficiary who predeceased the testator had only a life estate.—*Re Baeder and Canadian Order of Chosen Friends* (1916), 36 O.L.R. 30, followed.—*Held*, also, that the attempt of the testator to charge the insurance fund with the payment of incumbrances was wholly ineffective. *Re Cole*, 173.

4. *Life Insurance—Endowment Certificate—Proof of Age of Insured—Statutory Admission—Insurance Act, R.S.O. 1914, ch. 183, sec. 166, sub-secs. 7, 9, 10, 11.*—In an action upon an endowment certificate whereby the defendants, a friendly society, insured the life of the plaintiff’s husband, the only defence was, that, by the terms of the application and certificate, the defendants were not obliged to pay unless and until the age of the insured was admitted or proved. In the application and certificate, the age

was stated as 33, but the plaintiff was not able to prove the correctness of the statement:—*Held*, having regard to the provisions of sub-secs. 7, 9, 10, and 11 of sec. 166 of the Insurance Act, R.S.O. 1914, ch. 183, that the defendants, by not complying with the provisions of sub-secs. 7 and 9—which, by sub-sec. 11, were applicable to this contract, made in 1888—must be deemed to have admitted the correctness of the statement: sub-sec. 10; and the plaintiff was entitled to recover. *Willoughby v. Canadian Order of Foresters*, 507.

See MORTGAGE, 3.

INTEREST.

See MORTGAGE, 1 — TRUSTS AND TRUSTEES.

INTOXICATING LIQUORS.

See CRIMINAL LAW, 5—LIQUOR LICENSE ACT.

JUDGMENT.

See CONTRACT, 5 — CRIMINAL LAW, 2—DIVISION COURTS — MARRIED WOMAN — NUISANCE — PARTIES, 1.

JURISDICTION.

See CERTIORARI — CONSTITUTIONAL LAW—CRIMINAL LAW, 6 — LIQUOR LICENSE ACT, 1, 3 — MARRIED WOMAN—RAILWAY.

JURY.

See NEGLIGENCE, 1, 2, 3.

LAND.

Right of Land-owner—Lateral and Subjacent Support—Interference with Natural Conditions—

*Excavation and Removal of Sand from Adjoining Lot — Act of Neighbour Combined with Operation of Natural Laws.]—The judgment of MIDDLETON, J., 34 O.L.R. 636, was affirmed. *Corporation of Birmingham v. Allen* (1877), 6 Ch.D. 284, 289, *Jordeson v. Sutton Southcoates and Drypool Gas Co.*, [1899] 2 Ch. 217, and *Trinidad Asphalt Co. v. Ambard*, [1899] A.C. 594, applied and followed. *Cleland v. Berberick*, 357.*

See EVIDENCE—LIMITATION OF ACTIONS—MUNICIPAL CORPORATIONS, 1—RAILWAY—TITLE TO LAND—VENDOR AND PURCHASER —WILL.

LAND TITLES ACT.

See WILL, 3.

LANDLORD AND TENANT.

1. *Entry by Landlord—Eviction of Tenant—Justification under Forfeiture Clause in Lease—Chattel Mortgage Made by Tenant—Landlord and Tenant Act, R.S.O. 1914, ch. 155, sec. 20 (2)—Application of—Failure to Give Notice—Nominal Damages—Costs.*—The notice required by sec. 20 (2) of the Landlord and Tenant Act, R.S.O. 1914, ch. 155, is necessary as a preliminary to re-entry without action—its application is not confined to cases where the landlord is suing for the recovery of the premises.—*In re Riggs, Ex p. Lovell*, [1901] 2 K.B. 16, approved and followed.—In this case, the making by the tenant of a chattel mortgage was a breach of a provision in the lease which gave the landlord the

right to re-enter and put an end to the lease; but the landlord was not entitled to enforce that right because he had not complied with the requirement of sec. 20 (2) as to notice. In entering, therefore, the landlord was a wrongdoer; but it did not follow that the tenant was entitled to recover such damages as he would have been entitled to if there had been no breach of the condition and no right in the landlord to evict him.—In the tenant's action for wrongful entry and wrongful ejection, he was *held* entitled to judgment, with nominal damages (\$5) only, and costs on the appropriate scale. *Greenwood v. Rae*, 367.

2.—*Lease—Acceleration Clause—Chattel Mortgage—Assignment for Benefit of Creditors—Landlord and Tenant Act, R.S.O. 1914, ch. 155, sec. 38 (1)—Sale of Goods Distrained—Application of Proceeds—Right of Landlord as against Chattel Mortgagee.*—The money realised from the sale of the goods distrained by the defendant, the landlord (see *Alderson v. Watson* (1916), 35 O L.R. 564), having been paid into Court, it was *held*, upon a motion by the defendant for payment out, that, although the defendant was entitled, as against the plaintiff, who was the assignee of the tenant for the benefit of his creditors, to one year's rent only, yet, as against the chattel mortgagee, the amount of whose mortgage exceeded the amount realised by sale of the goods, the defendant had the right, upon the making of the assignment, to

distrain for two years' rent, as provided in the lease; and an order for payment out was made accordingly.—The limitation imposed by sec. 38 (1) of the Landlord and Tenant Act, R.S.O. 1914, ch. 155, could be invoked by the assignee only for the purpose of protecting his own interest in the chattels distrained, and did not enure to the benefit of the chattel mortgagee.—*Railton v. Wood* (1890), 15 App. Cas. 363, and *Brocklehurst v. Lawe* (1857), 7 E. & B. 176, followed. *Alderson v. Watson*, 502.

3. *Lease of Part of Building with Furniture and Equipment for Use as Theatre—Implied Warranty or Condition—Fitness for Human Habitation—Breach—Inadequacy of Heating Appliances.*]

—In the case of a demise of real property only, a condition or warranty that it is fit for the purpose for which it is intended to be used will not be implied; but there is an exception to that rule in the case of a furnished house; and where the demise was not of realty only, but of the whole contents of part of a building used as a moving picture theatre, including seats, machinery, and equipment, the case was *held* to be one within the exception, and a warranty or condition that the theatre was fit for immediate occupation and use as a theatre was implied.—Review of the authorities. *Smith v. Marrable* (1843), 11 M. & W. 5, and *Wilson v. Finch Hatton* (1877), 2 Ex. D. 336, followed.—*Held*, also, that the condition or warranty was brok-

en; the letting being for a period covering the winter months, and the heating appliances being inadequate, the building was unfit for human habitation.—Judgment of *MASTEN, J.*, 35 O.L.R. 162, affirmed. *Davey v. Christoff*, 123.

LATERAL SUPPORT.

See *LAND*.

LEASE.

See *CONTRACT*, 3—*LANDLORD AND TENANT*.

LEAVE TO APPEAL.

See *LIBEL*, 1.

LEGACY.

See *WILL*.

LIBEL.

1. *Company—Pleading—“Fair Comment”—Discovery—Examination of Officer of Plaintiff Company—Relevancy of Questions—Financial Condition of Company—Order of Judge in Chambers—Discretion—Appeal—Questions of no Practical Consequence—Leave to Appeal—Rule 507.*—The plaintiffs, an incorporated company, sued the defendants, also an incorporated company, the publishers of a newspaper, for libel in having said of the plaintiffs in print, in substance, that their stock was worthless because the rotary engine which they were formed to make and sell was of no value. An officer of the plaintiff company, being examined for discovery by the defendants, refused to answer certain questions put to him. The defendants did not plead

justification, but “fair comment.” Some of the questions put to the officer related to his personal acts, and others to matters affecting the plaintiff company, their finances, prospectus, business dealings, etc.:—*Held*, that an order of *BOYD, C.*, in Chambers, requiring the officer to answer the questions, should be affirmed with a trifling variation.—Discussion as to the relevancy of the questions, as to the plea of fair comment, and as to whether an appeal in such a case should be entertained.—*Peek v. Ray*, [1894] 3 Ch. 282, applied. *Augustine Automatic Rotary Engine Co. v. Saturday Night Limited*, 551.

2. *Opprobrious Epithets Applied to Woman — Defamatory Meaning—Imputation of Unchastity—Judge’s Charge—Misdirection—Excessive Damages — New Trial.*—The plaintiff, a young woman employed by a business man with whom the defendant had business relations, complained that the defendant had libelled her in letters written by him to her employer, who was absent from his place of business and had left his affairs in her hands. Some of the expressions used in the letters in reference to the plaintiff were: “Call off your slut!” “Call off your carrion!” “Call off your dogs!” “If this woman controls you, body and soul, it’s time I knew it:”—*Held*, that the words should be interpreted in their plain and popular meaning, according to the ordinary usage of society.—(2) In their plain and popular

meaning, the statements complained of, as a whole, were capable of a defamatory meaning.—(3) They were not capable of being understood as imputing unchastity or immoral conduct to the plaintiff; *MAGEE, J.A.*, dissenting.—(4) It was open to the defendant to complain in the appellate Court of misdirection, notwithstanding that no objection to the charge was taken at the trial.—A new trial was ordered on the ground of mistaken misdirection and on the ground that the damages were assessed by the jury at an excessive amount (\$15,000). *Quillinan v. Stuart*, 474.

LICENSE.

See LIQUOR LICENSE ACT—WATER.

LIEN.

See MECHANICS' LIENS.

LIFE INSURANCE.

See INSURANCE, 2, 3, 4.

LIMITATION OF ACTIONS.

1. *Mortgage — Redemption — Infant — Disability — Limitations Act, R.S.O. 1914, ch. 75, sec. 40—Application of—Action for Recovery of Land.*—The disability sections of the Limitations Act do not apply to actions to redeem.—Review of the legislation and decided cases.—The decision of the Court of Appeal in *Faulds v. Harper* (1884), 9 A.R. 537, followed. The judgment of the Supreme Court of Canada in that case (1886), 11 S.C.R. 639, though it reversed the judgment of the Court of Appeal,

proceeded on an entirely different ground from that upon which the case was decided in the Court below, and the expressions of opinion of Strong and Henry, J.J., as to the application of the disability clauses (as to which there is much conflict in the decided cases) were only *obiter*. *Smith v. Darling*, 587.

2. *Tenants in Common—Possession by one Tenant—Bailiff or Guardian of Co-tenants—Break in Possession — Limitations Act, R.S.O. 1914, ch. 75, sec. 5—Equitable Rights—Conduct Precluding Assertion of.*—The judgment of MEREDITH, C.J.C.P., 34 O.L.R. 63, was affirmed.—The possession of the defendant after her husband's death was, as respects the interests of the five children, held to be that of bailiff for the children; but there was, on the facts of the case, a sufficient break in the possession to dissolve the relationship of principal and agent or bailiff, or ward and guardian, that existed between the plaintiffs and the defendant, more than ten years before the proceedings for partition were begun; and the defendant had acquired a title to the land under the Limitations Act, R.S.O. 1914, ch. 75, sec. 5.—*In re Maguire and M'Clelland's Contract*, [1907] 1 I.R. 393, approved and followed.—The right of the plaintiffs to treat the defendant in respect to her possession as bailiff for them rested upon equitable principles; and, in the circumstances of the case, they were precluded by their acts and conduct from invoking

the equitable doctrine upon which they relied.—*Snider v. Carleton* (1915), 35 O.L.R. 246, and [1916] A.C. 266, *sub nom. Central Trust and Safe Deposit Co. v. Snider*, applied and followed. *Fry and Moore v. Speare*, 301.

See EXECUTORS AND ADMINISTRATORS—TITLE TO LAND.

LIQUOR LICENSE ACT.

1. *Conviction for Offence against—Evidence—Amendment of Information—Adjournment—Waiver—Sec. 92 of Act—Jurisdiction of Convicting Magistrate—Place of Offence—Judicial Notice—Police Magistrates' Act, R.S.O. 1914, ch. 88, secs. 24, 28—Imprisonment in Default of Payment of Fine and Costs—Warrant of Commitment—Habeas Corpus—Jurisdiction to Commit—Sec. 65 of Liquor License Act—Charges for Conveying to Goal—Statement in Warrant—Irregularity—Amendment—Criminal Code, secs. 1121, 1124—Ontario Summary Convictions Act, R.S.O. 1914, ch. 90, sec. 4—Sec. 94 (2) of Liquor License Act—Illegality of Caption—Legality of Detention—Refusal of Judge to Discharge Prisoner—Right of Appeal—Certificate of Attorney-General—Sec. 113 (1) of Act.]—Certain points, indicated in the head-lines, as to the jurisdiction of a Police Magistrate, the legality of a conviction, for two offences against the Liquor License Act, R.S.O. 1914, ch. 215, and the legality of the detention of the defendant under a warrant of commitment; were decided by LATCHFORD, J., in*

Chambers, in dismissing a motion upon the return of a *habeas corpus*, for the discharge of the defendant.—*Rex v. Whitesides* (1904), 8 O.L.R. 622, followed.—*Held*, by a Divisional Court, that, in the absence of a certificate from the Attorney-General, as provided in the Liquor License Act, sec. 113 (1), an appeal from the order of LATCHFORD, J., refusing to discharge the defendant, could not be entertained.—*Rex v. Graves* (1910), 21 O.L.R. 329, approved. *Rex v. Gage*, 183.

2. *Magistrate's Conviction of Unlicensed Person for Keeping Intoxicating Liquor for Sale—Proof of Intoxicating Nature of Liquor—Certificate of Government Analyst—Production by Chief of Police of City—"Inspector or any Officer of the Crown"—R.S.O. 1914, ch. 215, secs. 106, 126, 128, 129.]—The Chief of Police for a city, employed and paid by the city corporation, and not shewn to have any authority from the Crown, is not an "officer of the Crown," within the meaning of sec. 106 of the Liquor License Act, R.S.O. 1914, ch. 215. And a magistrate's conviction of a person accused of keeping intoxicating liquor for sale, contrary to the Act, based upon a certificate of the Government analyst, procured and produced by the Chief of Police for a city, shewing that liquor found upon the premises of the accused contained more than 2½ per cent. of proof spirits, was quashed—not being sustainable without a certificate produced by "the*

Inspector or any officer of the Crown."—Sections 126, 128, and 129 of the Act, considered.—The earlier part of sec. 129 cannot be so construed as to make of a policeman or constable an officer of the Crown with the powers conferred on such an officer by sec. 106. *Rex v. Hurley*, 159.

3. *Offence against sec. 78—Attempting to Tamper with Witnesses on Prosecution under Act—Powers of Provincial Legislature—Validation of ultra Vires Enactment by Dominion Legislation—Canada Temperance Act, R.S.C. 1906, ch. 152, sec. 150—Want of Certainty in Informations and Convictions—Convictions by two Justices—Adjudication by one only—Jurisdiction—Attempt to Tamper before Prosecution Initiated—"On any Prosecution"—Motion to quash Convictions—Costs.*—Section 78 of the Liquor License Act, R.S.O. 1914, ch. 215, is in effect validated by sec. 150 of the Canada Temperance Act, R.S.C. 1906, ch. 152; under the combined legislation of the Province and the Dominion, magistrates have jurisdiction in a summary way to convict for the offence of attempting to tamper with a witness on a prosecution under the Liquor License Act.—*Regina v. Lawrence* (1878), 43 U.C.R. 164, in which case it was decided that the original of sec. 78 was *ultra vires*, distinguished.—Neither the information nor the convictions stated in what way the witnesses were asked to swear falsely; but it was *held*, that there was no want of certainty, the words of

the statute being followed, and there being no misapprehension of what was involved.—*Regina v. Lawrence, supra*, followed upon this point.—The convictions purported to be made by two Justices of the Peace. The hearing was before the two; judgment was reserved; and the result was announced in open court by one Justice only, reasons in writing being signed by both:—*Held*, that no want of jurisdiction appeared upon these facts.—Judgment of Gregory, J., in *Rex v. Haines* (1908), 39 N.B.R. 49, not followed; opinion of BARKER, C.J., in the same case at p. 51, approved.—One of the convictions was quashed (but without costs), upon the ground that the attempt to tamper appeared to have been made before the prosecution for the earlier offence was commenced.—*Ex p. White* (1890), 30 N.B.R. 12, and *Regina v. LeBlanc* (1885), 8 Legal News (Montreal) 114, followed.—The other conviction was affirmed with costs. *Rex v. Armstrong*. 2.

4. *Offence against sec. 141 of R.S.O. 1914, ch. 215—Person Found Intoxicated in Local Option Municipality—"Public Place"—Amending Act, 5 Geo. V. ch. 39, sec. 33—Blacksmith's Forge—Magistrate's Conviction.*—A "public place" is one where the public go, no matter whether they have a right to go or not.—*Regina v. Wellard* (1884), 14 Q.B.D. 63, followed.—A blacksmith's forge was *held* to be a "public place," within the meaning of clause (a) of sec. 141 of the Liquor License Act, R.S.O. 1914,

ch. 215, as added by 5 Geo. V. ch. 39, sec. 33; and a motion to quash a magistrate's conviction of a person for being found in an intoxicated condition in a forge situated in a municipality in which a local option by-law was in force, was refused.—*Rex v. Cook* (1912), 27 O.L.R. 406, distinguished as having been decided before the amendment of the statute. *Rex v. Leitch*, 1.

LOCAL OPTION.

See LIQUOR LICENSE ACT, 4.

MAINTENANCE.

See PARENT AND CHILD.

MARRIAGE.

See CONSTITUTIONAL LAW, 1—CRIMINAL LAW, 4.

MARRIED WOMAN.

Action against — Contract — Coverture not Pleaded — Estoppel — Judgment — Affirmance by Appellate Court — County Court — Order Changing Form of Judgment from Personal to Proprietary — Jurisdiction.] — This action (upon a contract) was brought in a County Court against the defendant as a feme sole; after trial, judgment passed against her, and was entered in the usual way, nothing appearing on the face of the proceedings or in the evidence to shew that she was a married woman. The judgment was affirmed by a Divisional Court upon appeal. After the result of the appeal had been certified to the County Court, the plaintiff applied to the Judge of that Court to amend the judgment, upon the ground that it

had been entered by mistake as a personal, instead of a proprietary, judgment—the defendant having been, when the contract was entered into and ever since, a married woman. Upon the application, the Judge made an order directing that the judgment should be discharged, with leave to the plaintiff to enter the proper judgment against a married woman.—*Held*, that the Judge had no jurisdiction to make the order; and it was set aside upon appeal.—The defendant, not having pleaded coverture, would be estopped by the judgment from afterwards setting up that she was a married woman.—*Oxley v. Link*, [1914] 2 K.B. 734, and *Prevost v. Bedard* (1915), 51 S.C.R. 269, distinguished. *Pearson v. Calder*, 458.

See HUSBAND AND WIFE.

MARSHALLING.

See MORTGAGE, 3.

MASTER AND SERVANT.

See NEGLIGENCE, 1.

MECHANICS' LIENS.

1. Claim against Purchaser of Unfinished Building—Absence of Actual Notice — Knowledge of Building Operations—Priority of Registration — Registry Act — "Owner" — Mechanics and Wage Earners Lien Act, R.S.O. 1914, ch. 140, secs. 2(c), 21.]—Under the Mechanics and Wage-Earners Lien Act, R.S.O. 1914, ch. 140, priority of registration, in the absence of actual notice, must prevail: sec. 21.—*Cook v. Kol-*

doffsky (1916), 35 O.L.R. 555, and *Marshall Brick Co. v. Irving* (1916), 35 O.L.R. 542, followed.—Knowledge that building is going on upon the land does not constitute actual notice.—*Richards v. Chamberlain* (1878), 25 Gr. 402, followed.—O. purchased from the building-owner land with an unfinished house upon it, to be taken over "as soon as house is completed." This was done, the deed registered and the money paid, about two weeks before the plaintiffs' and other liens were recorded in respect of work done for and materials furnished to the building-owner. O. had no actual notice of any liens or claims for liens:—*Held*, that he was entitled to priority by virtue of the Registry Act; and that he did not come within that part of the definition of an owner (sec. 2 (c)) which depends upon privity, consent, or benefit, coupled with request, so as to render the land subject to the liens. — *Gearing v. Robinson* (1900), 27 A.R. 364, followed; and *Slattery v. Lillis* (1905), 10 O.L.R. 697, 703, approved and followed. *Sterling Lumber Co. v. Jones*, 153.

2. *Claim of Lien-holder to Priority over Mortgages upon Increased Selling Value—Claim not Made in Registered Claim of Lien—Form Prescribed by Act—Validity of Claim—Mechanics and Wage-Earners Lien Act, R.S.O. 1914, ch. 140, secs. 8 (3), 17, 23.*—When a lien under the Mechanics and Wage-Earners Lien Act, R.S.O. 1914, ch. 140, is claimed against a prior mortgagee, under sub-

sec. 3 of sec. 8, it is not essential to the preservation of the lien as against the mortgagee that the claim shall be made in the registered claim of lien.—Where a claimant, within the proper time, registers a claim of lien, in the form prescribed by the Act and containing everything which sec. 17 requires to be set out in the claim, and in due time brings his action to realise his claim, the registration is effectual to preserve his lien against the prior mortgagee or mortgagees, notwithstanding that they are not named in the registered claim; and sec. 23 cannot be invoked against the claimant.—It was adjudged that the claimant's lien attached upon the increased selling value in priority to the mortgages. *Whaley v. Linnenbank*, 361.

3. *Lien of Material-Man—Validity—Mortgagee—Release of Equity of Redemption in Favour of—Registration of Deed before Liens Registered—Absence of Actual Notice—Priority—Registry Act, R.S.O. 1914, ch. 124, secs. 2 (c), 71—Mechanics and Wage-Earners Lien Act, R.S.O. 1914, ch. 140, secs. 14 (2), 21—Right of Lien-holder as to Portion of Mortgage-moneys not Advanced.*—M. bought land from L., and built upon it; mechanics' liens arose out of the building, which was done for M. and on his credit; part of his purchase-money was unpaid, and he mortgaged the land for a further sum, the greater part of which he spent upon the building. The purchase and building were speculative, the speculation failed, and M. con-

veyed to L. all his interest in the land, in consideration of the purchase-money due and of L. assuming the mortgage made by M., at its full amount. Unregistered liens existed, but none was registered against the land until after the registration of the conveyance from M. to L.; and the latter had up to that time no actual notice of any of the liens:—*Held*, applying the provisions of sec. 14 (2) of the Mechanics and Wage-Earners Lien Act, R.S.O. 1914, ch. 140, to the first transaction between L. and M., that L. was to be treated as if mortgagee and M. as if mortgagor of the land; and the later transaction had the effect of a release of the equity of redemption.—(2) That by the effect of sec. 71 of the Registry Act, R.S.O. 1914, ch. 124 (see sec. 2 (c)), and sec. 21 of the Mechanics and Wage-Earners Lien Act, L. had priority over the lien-holders, and the liens were ineffectual against him—except, it might be, as to such portion of the moneys secured by the mortgage assumed by him, at its full amount, as had not been actually advanced. *Charters v. McCracken*, 260.

MISDIRECTION.

See CRIMINAL LAW, 2—LIBEL, 2.

MISREPRESENTATION.

See EVIDENCE.

MISTAKE.

See DIVISION COURTS.

MIXED FUND.

See WILL, 2.

MORTGAGE.

1. *Action for Foreclosure Brought without Leave—Interest Accruing de Die in Diem under Special Provision—Interest not otherwise in Arrear—Mortgagors and Purchasers Relief Act, 1915, secs. 2 (1), 4 (3)—Exception as to Interest—Onus.*—By the Mortgagors and Purchasers Relief Act, 1915, 5 Geo. V. ch. 22 (O.), the enforcement of payment of the principal money payable upon a mortgage is (sec. 2 (1)) prohibited during the war. There is an exception (sec. 4 (3)) as to interest, taxes, etc.; but the onus of shewing that his claim comes within the exception is upon the mortgagee; and the exception applies only to interest contracted, in the ordinary manner, to be paid; it does not apply to interest accruing *de die in diem* by reason of a special provision in the mortgage—if that was indeed the meaning of an obscure provision contained in the mortgage-deed in this case.—An order of CLUTE, J., dismissing an action for foreclosure brought by a mortgagee, without the leave of a Judge (sec. 2 (1)), where there had been no default in payment of the regular gales of interest, was affirmed. *George v. Lang*, 180.

2. *Order of Judge under Mortgagors and Purchasers Relief Act, 1915—Right of Appeal—“Absolute Discretion”—Secs. 2 and 5 of Act—Rule 507.*—No appeal lies from the order of a Judge, under secs. 2 and 5 of the Mortgagors and Purchasers Relief Act, 1915, granting or refusing leave to proceed for the recovery of principal money upon a mortgage.—The

statute makes the leave of a Judge a condition precedent to the bringing of an action; and upon the application for leave the Judge is given certain powers to be exercised "in his absolute discretion" and "subject to such conditions as he thinks fit:" sec. 5 (1).—In the absence of any provision in the Act itself giving the right of appeal, the provisions of Rule 507 should not be imported, simply because "the application shall be upon originating notice:" sec. 2 (2). *Re George and Lang*, 382.

3. *Funds Derived from Fire Insurance and from Sale of Mortgaged Premises—Application of Insurance Moneys—Mortgages Act, R.S.O. 1914, ch. 112, sec. 6 (2)*—"Marshalling" — *Execution Creditors—Second Mortgagee — Priorities—Master's Report—Appeal.*]—"Marshalling" properly arises where a creditor, who has two funds, chooses to resort to the only fund upon which other creditors can go, in which case they are to stand in his place for so much against the fund to which they otherwise could not have access.—Where a Local Master, upon a reference in a mortgage action, treated the moneys derived from the mortgaged premises as two funds because part came from insurance upon buildings on the premises destroyed by fire, and part from the sale of the mortgaged premises after the fire, and dealt with the proceeds of the insurance by process of marshalling between prior and subsequent mortgagees, thus impairing the rights of execution creditors intermediate between the mortgagees, his report

was, upon appeal by the execution creditors, corrected.—The insurance policy insured the mortgagor against loss by fire, and contained a clause by which the loss was made payable in the first instance to the first mortgagees (the plaintiffs) and in the second instance to the defendant W. (a subsequent mortgagee), "as their interests may appear." The premiums were paid by the plaintiffs and charged to the mortgagor. The amount of the insurance was not sufficient to satisfy the claim of the plaintiffs:—*Held*, that the plaintiffs had the right to apply all the insurance money to satisfy their own mortgage: *Mortgages Act, R.S.O. 1914, ch. 112, sec. 6 (2)*; and, that application being made, the first mortgage was reduced for the benefit of the execution creditors; and the defendant W. had no right to complain.—*Edmonds v. Hamilton Provident and Loan Society* (1891), 18 A.R. 347, specially referred to. *Midland Loan and Savings Co. v. Genitti*, 163.

See LIMITATION OF ACTIONS, 1—MECHANICS' LIENS, 2, 3—VENDOR AND PURCHASER—WILL, 2.

MORTGAGORS AND PURCHASERS RELIEF ACT.

See MORTGAGE, 1, 2.

MOTOR VEHICLES.

See HIGHWAY, 3.

MUNICIPAL CORPORATIONS.

1. *Action against Township Corporation for Injury to Land—Deposit of Sand from Highway—*

Nonrepair of Highway—Necessity for Notice under Municipal Act, sec. 460—Amendment at Trial.]

Water ran from a highway upon the plaintiff's land, but did no harm until the defendants, a township corporation, in repairing the highway, diverted the course of the water so that it ran through and gathered up sand and deposited it upon the plaintiff's land, to his injury:—*Held*, that the plaintiff's action for damages for that injury was not one for damages caused by the neglect of the defendants to keep the highway in repair; and that he had a good cause of action, which was not barred by failure to give the notice required by sec. 460 of the Municipal Act, R.S.O. 1914, ch. 192.—*Strang v. Township of Arran* (1913), 28 O.L.R. 106, considered and distinguished.—*Semble*, per RIDDELL, J., that the defendants were properly allowed to amend at the trial by setting up the want of notice. *Ormsby v. Township of Mulmur*, 566.

2. *Erection of Urinals upon and under Public Highway in City—Injurious Affection of Property Abutting on Highway—Depreciation in Value—Liability of City Corporation to Make Compensation—Arbitration and Award—Municipal Act, R.S.O. 1914, ch. 192, secs. 325, 406 (8).*]

The four Judges composing a Divisional Court were equally divided in opinion as to the right of land-owners, claimants under sec. 325 of the Municipal Act, to compensation for the injurious affection of their land, upon which they had built, and were carrying on the

business of, a departmental store, by the erection and maintenance by the municipality, upon and under a city street on which the land abutted, of public conveniences (lavatories, urinals, etc.), no land of the claimants having been taken, and the highway not being obstructed; and an award of compensation was, in the result, affirmed.—Discussion of the effect of sec. 406 (8) of the Act, authorizing the erection of such conveniences; and review of the authorities. *Re J. F. Brown Co. Limited and City of Toronto*, 189.

3. *Expropriation of Leasehold and Water Power—Compensation—Value of Rights—Business Loss or Gain—Deduction of Rent—Costs—Award—Right of Appeal—Public Utilities Act, R.S.O. 1914, ch. 204, sec. 4—Application of Part XVI. of Municipal Act, R.S.O. 1914, ch. 192.*]

Part XV. of the Municipal Act, R.S.O. 1914, ch. 192, being made, by sec. 4 of the Public Utilities Act, R.S.O. 1914, ch. 204, to apply to the taking of lands by a municipality under the latter Act, and providing for the determination by arbitration of the amount to be paid, the provisions found in Part XVI., which are auxiliary to the provision in Part XV. giving the right to arbitrate, also apply; and, therefore, the right to appeal from the award, expressly conferred by Part XVI., exists.—A town corporation, having leased to P., for three years, a factory building and premises with the right to use a water power, expropriated, when the lease had a year to run, the leasehold and water right, for use in connection

with their pumping plant:—*Held*, that the municipality should pay the value of what they had expropriated; and could not set off against that the value the loss that P. might sustain if he continued to use the premises in his business; nor could P. claim from the municipality the profit which he might have made if he had continued in business.—P. should be allowed the power for one year, the value of the use and occupation of the building, and a reasonable sum for the expense of removing his business to some other premises; one year's rent should be deducted from the amount allowed, and also a sum due for rent at the time of expropriation; and the costs of arbitration and appeal should be paid by the municipality, who had made no offer of compensation. *Re Perram and Town of Hanover*, 582.

See CONTRACT, 3—HIGHWAY—INDEMNITY—NEGLIGENCE, 1—NUISANCE—RAILWAY.

MUNICIPAL ELECTIONS.

Alderman — Disqualification — Chief Officer of Association Having Contractual Relations with City Corporation—Application for Fiat—Time—Municipal Act, R.S.O. 1914, ch. 192, sec. 162 (1)—Facts Known to Relator at Time of Election — Ground of Application — Additional Evidentiary Facts Becoming Known after Election.—Under sec. 162 (1) of the Municipal Act, R.S.O. 1914, ch. 192, a relator must make his application for a fiat to commence proceedings to unseat a member of a municipal council, within six weeks after an election,

or one month after the acceptance of office, unless the facts upon which he relies did not come to his knowledge until after the election, when he has six weeks after the facts came to his knowledge:—*Held*, that the “facts” are the “ground;” and, if the “facts” which form the real ground for the application are known at the time of the election, the time will not be extended simply because the relator afterwards becomes aware of facts which are mere evidence, additional evidence, in support of the “facts” forming the “ground,” known at the time of the election.—It was *held*, that certain additional facts which, it was said, had come to the relator's knowledge since the election and within six weeks of his second application, were merely evidentiary; and, therefore, he was not *rectus in curia*.—*Seem*, that the dismissal of the application would not prevent an application by another relator.—*Seem*, also, that, in the circumstances of the case, it was improper that the respondent should hold his seat. *Re Rex ex rel. Stephenson v. Hunt*, 385.

MUNICIPAL PERMIT.

See NUISANCE.

NAVIGABLE WATERS.

See PARTIES, 2.

NEGLIGENCE.

Death of Workman Employed by Electric Company—Negligent Arrangement of Wires—Electric Shock—Failure of Foreman to Warn Workman—Liability of Company—Dangerous Situation Created by

Operations of City Corporation—Liability of Corporation—Findings of Jury.]—A workman employed by an electric company, at the bidding of the company's foreman, mounted a pole erected by the company upon a city street, and cut one of the wires of the company, in which there was a high-tension current. This pole had been moved by the company, by direction of the city corporation, to a place selected by the corporation; and the corporation had afterwards erected a pole not far from the company's pole and guyed it by a guy-wire running close to the company's pole, and wound round the corporation's pole, in contact with a lightning-arrester. There was an insulator on the guy-wire, but it was not between the two poles. The workman's body coming near the corporation's guy-wire, a grounding was affected through his body, the guy-wire, and the lightning-arrester—the current passed through him, and he was killed:—*Held*, that the jury were justified in finding negligence against the company, through its foreman, who should have known of and warned the deceased of the arrangement of the wires, which he said was a trap; and the company was properly held liable.—*Held*, also, that the city corporation was properly found to have been negligent, for it had created the dangerous situation, after having directed the removal of the company's pole and impliedly consented to the company's men going up the pole for necessary purposes; and it also was rightly held liable; MEREDITH, C.J.C.P.,

dissenting. *Lambert v. City of Toronto*, 269.

2. *Explosion of Boiler in Building—Death of Person Engaged therein—Action by Widow under Fatal Accidents Act—Defence—Settlement of Claim—Absence of Concluded Bargain—Common Employment—Negligence of Defendants' Superintendent and Engineer—Findings of Jury—Supplemental Finding by Appellate Court—Explanation of Explosion.*]—The plaintiff's husband (the partner of a man who had a contract with the defendants) was killed by the explosion of a boiler which was in use for heating a building in which the defendants were holding an exhibition; and she brought this action, under the Fatal Accidents Act, to recover damages for his death:—*Held*, that a defence set up by the defendants, that the plaintiff had made a settlement of her claim by an agreement with a city corporation, the owners of the building, failed because, assuming the authority (which was disputed) of a certain solicitor to make a settlement for the plaintiff, there never was a concluded bargain binding on the city corporation for the settlement of the plaintiff's claim.—(2) That the plaintiff's deceased husband was not, at the time of his death, in the service of the defendants; and no question of common employment arose.—(3) That there was no other reasonable explanation of the explosion than that it was occasioned by the negligence of the defendants' superintendent and their engineer in charge of the boiler; that the jury's finding that the superintendent

was negligent was warranted by the evidence, and should be supplemented by a finding that the engineer was negligent; and that the defendants were liable for the negligence of both.—*McArthur v. Dominion Cartridge Co.*, [1905] A.C. 72, applied. *St. Denis v. Eastern Ontario Live Stock and Poultry Association*, 640.

3. *Street Railway—Death of Man Struck by Moving Car—Excessive Speed not Shewn—Sounding of Gong—Evidence—Onus—Proximate Cause—No Reasonable Case for Jury—Contributory Negligence—Ultimate Negligence—Provisional Assessment of Damages at Trial.*—The plaintiff's husband, attempting to cross a street upon which the tracks of the defendants were laid, came into collision with an electrically-operated car of the defendants, and was so injured that he died. At the trial of this action, brought by his widow to recover damages for his death, it was not alleged or proved that the speed of the car was excessive; and, though some witnesses testified that they did not hear the gong sounded, they were not asked whether they would have heard it had it been rung. The driver testified positively that he did sound the gong, and that he took all possible care; and he swore to reckless or stupid want of care on the part of the man who was killed, want of care which directly caused his death.—*Held* (LENNOX, J., dissenting), that no evidence was adduced upon which reasonable men could find that the proximate cause of the injury done was the defendants' negli-

gence; and that the plaintiff was properly nonsuited at the trial.—*Loach v. British Columbia Electric R.W. Co.*, [1916] A.C. 719, approving the judgment of Anglin, J., in *Brenner v. Toronto R.W. Co.* (1907), 13 O.L.R. 423, referred to. *Sitkoff v. Toronto R.W. Co.*, 97.

See HIGHWAY, 2—INDEMNITY.

NEW TRIAL.

See APPEAL—CRIMINAL LAW, 2, 4—LIBEL, 2.

NOMINAL DAMAGES.

See LANDLORD AND TENANT, 1.

NONREPAIR.

See HIGHWAY—MUNICIPAL CORPORATIONS, 1.

NOTICE.

See HIGHWAY, 2 — LANDLORD AND TENANT, 1 — MECHANICS' LIENS, 1, 3—MUNICIPAL CORPORATIONS, 1 — PRINCIPAL AND AGENT — VENDOR AND PURCHASER.

NUISANCE.

Noxious Trade — Injury to Neighbour—Odours, Smoke, and Noise—Findings of Fact of Trial Judge — Evidence — Appeal — Injunction — Form of Judgment —Municipal Permit — Effect of—Municipal Act, R.S.O. 1914, ch. 192, sec. 409 (2).—It was found by the trial Judge that the carrying on of the defendant's business of a blacksmith upon a lot fronting on a city street was a nuisance to the plaintiff, as owner and occupier of an adjoining lot and of his house upon it; and that the defendant's

business was carried on by him in the usual and in a proper manner; and by the judgment of the trial Judge the defendant was enjoined from so operating as to cause a nuisance to the plaintiff by reason of offensive odours, smoke, and noise:—*Held*, that the findings of fact could not, upon the evidence, be disturbed; but that the judgment should be varied so as to restrain the defendant from operating in the manner hitherto pursued by him or in any other manner so as to cause a nuisance to the plaintiff by reason of the offensive odours, smoke, or noise.—*Held*, also, that the permission given by the municipal authority to the defendant to erect a blacksmith-shop upon his lot did not authorise him to commit a nuisance thereon.—Scope and meaning of sec. 409 (2) of the Municipal Act, R.S.O. 1914, ch. 192. *Beamish v. Glenn*, 10.

NULLITY.

See DIVISION COURTS.

OFFICER OF THE CROWN.

See LIQUOR LICENSE ACT, 2.

OPINION EVIDENCE.

See CRIMINAL LAW, 2.

OPTION.

See VENDOR AND PURCHASER.

PARENT AND CHILD.

Liability of Parent for Maintenance of Forisfamiliar Infant — Oral Agreement — Implication — Breach — Parent Inducing Child to Leave Foster-home — Findings of Fact of Trial Judge — Appeal —

Damages — Costs.] — The judgment of *Boyd, C.*, 35 O.L.R. 36, was affirmed upon the question of the defendant's liability, but varied by reducing the plaintiff's damages to \$280, with costs of the action to the plaintiff on the County Court scale without set-off, and leaving each party to bear his own costs of the appeal. *Latimer v. Hill*, 321.

See INFANTS.

PARLIAMENT.

See CONSTITUTIONAL LAW — LIQUOR LICENSE ACT, 3.

PART PERFORMANCE.

See CONTRACT, 3.

PARTIES.

1. *Action by Judgment Creditor and Assignee of Judgment-debt — Champertous Agreement — Right of Judgment Creditor to Recover.*] — Some time before an action was brought, to enforce against the profits of a business carried on by a man in the name of his wife, a judgment recovered against the man himself, the judgment creditor assigned the judgment-debt to a stranger, who made a concurrent declaration in writing that he was not the beneficial owner of the judgment-debt—that he was a trustee for the judgment creditor, to whom he must account for all moneys received after paying costs:—*Held*, the action being brought in the names of both assignor and assignee as plaintiffs, that, although the agreement between the plaintiffs was champertous and illegal, the plaintiff the assignor could make out his case

without it, and his right of action was not affected. — *Colville v. Small* (1910), 22 O.L.R. 426, followed. *Walker v. Brown*, 287.

2. *Action by Provincial Attorney-General against Contractor Employed by Dominion Government — Removal of Sand and Gravel from Beds of Navigable Waters—Rights of Province and Dominion—Addition of Attorney-General for Dominion as Defendant—Rule 134.*—In an action by the Attorney-General for Ontario to recover the value of sand and gravel removed by the defendant company from the beds of the River St. Clair and Lake Erie, it appeared that the defendant company took the sand and gravel in the course of dredging the river and lake to construct a steamboat channel, under a contract with the Dominion Government; and, there being a dispute as to whether the right was in the Province or the Dominion, the Attorney-General for the Dominion was, upon his own suggestion, through the defendant company, added as a party defendant, "to enable the Court effectually and completely to adjudicate upon the questions involved in the action:" Rule 134. *Attorney-General for Ontario v. Cadwell Sand and Gravel Co. Limited*, 585.

See EXECUTORS AND ADMINISTRATORS — VENDOR AND PURCHASER.

PASSENGER.

See CRIMINAL LAW, 6—HIGHWAY, 4.

PENALTY.

See CRIMINAL LAW, 6.

PERPETUITIES.

See VENDOR AND PURCHASER—WILL, 3.

PHARMACY ACT.

See HUSBAND AND WIFE.

PLEADING.

See LIBEL, 1.

POLICE MAGISTRATE.

See CRIMINAL LAW, 6—LIQUOR LICENSE ACT.

POSSESSION.

See EVIDENCE—LIMITATION OF ACTIONS—TITLE TO LAND.

POWER OF APPOINTMENT.

See INSURANCE, 2.

POWER OF SALE.

See WILL, 3.

PRACTICE.

Specially Endorsed Writ of Summons—Statement of Claim Treated as Amendment—Rules 111, 127.—Where the writ of summons is specially endorsed, the endorsement may be treated as a statement of claim, and no other statement of claim is necessary (Rule 111); but the plaintiff is entitled, under Rule 127, to amend the claim specially endorsed on the writ.—Where the plaintiff, in an action commenced by a specially endorsed writ, delivered a statement of claim, setting forth facts and particulars not mentioned in the endorsement, and such as would have reasonably been embodied in an

amendment under Rule 127, the statement of claim was treated as an amendment, the word "Amended" being added to it.—*Dunn v. Dominion Bank* (1913), 5 O.W.N. 103, distinguished. *Dunn v. Phillips*, 580.

See APPEAL — CERTIORARI — DIVISION COURTS — EXECUTORS AND ADMINISTRATORS — INFANTS — LIBEL, 1—PARTIES.

PREMIUM.

See CRIMINAL LAW, 3.

PRESCRIPTION.

See TITLE TO LAND.

PRESUMPTION.

See EVIDENCE.

PRINCIPAL AND AGENT.

Contracts by Agent for Purchase of Goods—Authority of Agent—Holding out—Estoppel—General Agency—Scope of Business—Commission Received by Vendor's Agent from Vendor Divided with Purchaser's Agent—Effect on Contracts—Absence of Fraud—Notice to Purchaser.—The defendant was held bound by two contracts for the purchase of goods from the plaintiffs, made by one D. in the name of the defendant, the authority of D. being denied by the defendant, who refused to accept the goods.—*Held*, also, that the contracts were not rendered unenforceable for fraud by reason of the fact that the plaintiffs' broker divided with D. commissions upon the sales which he received from the plaintiffs. The defendant had notice of the division; and the facts did not

bring the case within the rule that where a person in the employment of another is bribed with a view to inducing him to act otherwise than faithfully to his employer, the agreement is a corrupt one and unenforceable at law, whatever the effect produced on the mind of the person bribed may be.—*Harrington v. Victoria Graving Dock Co.* (1878), 3 Q.B.D. 549, *Great Western Insurance Co. v. Cunliffe* (1874), L.R. 9 Ch. 525, and *Baring v. Stanton* (1876), 3 Ch.D. 502, specially referred to. *Panama and South Pacific Telegraph Co. v. India Rubber Gutta Percha and Telegraph Works Co.* (1875), L.R. 10 Ch. 515, and *Hitchcock v. Sykes* (1913-14), 29 O.L.R. 6, 49 S.C.R. 403, distinguished. *Stoney Point Canning Co. v. Barry*, 522.

PRIOR KNOWN DECISION.

See INSURANCE, 2.

PROHIBITION.

See DIVISION COURTS.

PROOF OF AGE.

See INSURANCE, 4.

PROPERTY PASSING.

See CONTRACT, 4.

PROVINCIAL LEGISLATURE.

See CONSTITUTIONAL LAW — LIQUOR LICENSE ACT, 3.

PROVINCIAL RIGHTS.

See PARTIES, 2.

PROXIMATE CAUSE.

See NEGLIGENCE, 3.

PUBLIC PLACE.

See LIQUOR LICENSE ACT, 4.

PUBLIC UTILITIES ACT.

See MUNICIPAL CORPORATIONS,
3.

RAILWAY.

*Damage to Land from Closing of Street in City—Elevation of Tracks—Order of Board of Railway Commissioners — Initiative — Jurisdiction — Elimination of Highway Crossings at Grade — Railway Act, R.S.C. 1906, ch. 37, sec. 238 (8 & 9 Edw. VII. ch. 32, sec. 5) — Municipal By-law — Remedy for Injurious Affection of Property — Compensation—Arbitration under Statute.]—Section 238 of the Dominion Railway Act, R.S.C. 1906, ch. 37, as enacted by the amending Act 8 & 9 Edw. VII. ch. 32, sec. 5, deals with proceedings in invitum of a railway company; it was passed to facilitate the elimination or diminishing of grade crossings; in furtherance of this object, it empowers the Board of Railway Commissioners to act upon its own motion; and it confers authority upon the Board to order that part of a highway be closed, or at all events to require the proper municipal body to close it.—*Held*, that the Board, in making an order approving a plan for elevating the tracks of a railway company in a city, was acting upon its own motion and within its jurisdiction; that the acts of which the plaintiff complained were lawfully done in the execution of the order; and that the plaintiff had no right of ac-*

tion; his remedy was to seek such compensation as he could obtain by arbitration proceedings under the Railway Act for the injurious affection of his property by the closing of part of the highway and for any injury sustained by the elevation of the tracks.—*Corporation of Parkdale v. West* (1887), 12 App. Cas. 602, distinguished. *Brant v. Canadian Pacific R.W. Co.*, 619.

See CRIMINAL LAW, 6—NEGLECT, 3.

REDEMPTION.

See LIMITATION OF ACTIONS.

REGISTRY LAWS.

See MECHANICS' LIENS—VENDOR AND PURCHASER.

RELATOR.

See MUNICIPAL ELECTIONS.

RES JUDICATA.

See CRIMINAL LAW, 2—WILL,
3.

RESIDENCE.

See WILL, 3.

REVOCATION.

See VENDOR AND PURCHASER.

RIVER.

See WATER.

ROAD.

See HIGHWAY.

**ROMAN CATHOLIC
SEPARATE SCHOOLS.**

See CONSTITUTIONAL LAW, 2.

RULES.

(Consolidated Rules of the Supreme Court of Ontario, 1913.)

Rule 111.]—*See* PRACTICE.

Rule 127.]—*See* PRACTICE.

Rule 134.]—*See* PARTIES, 2.

Rule 499.]—*See* APPEAL.

Rule 507.]—*See* MORTGAGE, 2.

SALE OF GOODS.

Refusal to Accept — Ground of Refusal—Request for Guaranty — Breach of Contract—Right of Inspection—Refusal to Permit Inspection — Tender — Waiver.]

The defendant sent to the plaintiff, carrying on business at Ingersoll, Ontario, an order for two car-loads of flour to be shipped to Montreal, Quebec, f.o.b. Montreal. The order was accepted, and the flour was shipped. After certain communications between the parties, the defendant refused to accept; the plaintiff resold at a loss, and brought this action for damages for non-acceptance:—*Held* (MASTEN, J., dissenting), that the defendant in fact refused to accept because the plaintiff would not undertake to protect the defendant in writing against loss if he took up the bills of lading of the flour, and if his buyers, on a resale by him, would not take delivery owing to quality; and that the defendant had broken the contract, and was liable for damages. — *E. Clemens Horst Co. v. Biddell Brothers*, [1912] A.C. 18, upon the question of the right to inspect, considered and distinguished. *Morrison v. Morrow*, 400.

See LANDLORD AND TENANT, 2.

SALE OF LAND.

See VENDOR AND PURCHASER—WILL, 3.

SCHOOLS.

See CONSTITUTIONAL LAW, 2.

SEAL.

See CONTRACT, 3.

SEARCH-WARRANT.

See CRIMINAL LAW, 5.

SEDUCTION.

See CRIMINAL LAW, 1.

SEPARATE PROPERTY.

See HUSBAND AND WIFE—MARRIED WOMAN.

SEPARATE SCHOOLS.

See CONSTITUTIONAL LAW, 2.

SETTLEMENT OF ACTION.

See EXECUTORS AND ADMINISTRATORS—NEGLIGENCE, 2.

SOLEMNISATION OF MARRIAGE.

See CONSTITUTIONAL LAW, 1.

SOLICITOR.

See CERTIORARI.

SPECIFIC PERFORMANCE.

See CONTRACT, 3 — VENDOR AND PURCHASER.

STATEMENT OF CLAIM.

See PRACTICE.

STATUTE OF FRAUDS.

See CONTRACT, 3, 5—EXECUTORS AND ADMINISTRATORS — VENDOR AND PURCHASER.

STATUTE OF LIMITATIONS.

See EXECUTORS AND ADMINISTRATORS—LIMITATION OF ACTIONS—TITLE TO LAND.

STATUTES.

30 & 31 Vict. ch. 3, secs. 91 (26)
92 (12) (Imp.) (British North
America Act).

See CONSTITUTIONAL LAW, 1.

30 & 31 Vict. ch. 3, sec. 93 (1) (Imp.).

See CONSTITUTIONAL LAW, 2.

R.S.O. 1897, ch. 129, secs. 16, 19
(Trustee Act).

See WILL, 3.

2 Edw. VII. ch. 17, sec. 1 (O.) (Amend-
ing Devolution of Estates Act).

See WILL, 3.

R.S.C. 1906, ch. 37, sec. 238 (Railway
Act).

See RAILWAY.

R.S.C. 1906, ch. 146, secs. 210, 211,
1002 (c) (Criminal Code).

See CRIMINAL LAW, 1.

R.S.C. 1906, ch. 146, secs. 335 (u), 505

See CRIMINAL LAW, 3.

R.S.C. 1906, ch. 146, secs. 577, 773,
(a), (b), 777 (5), 780, 1035, 1044.

See CRIMINAL LAW, 6.

R.S.C. 1906, ch. 146, sec. 1019.

See CRIMINAL LAW, 2.

R.S.C. 1906, ch. 146, secs. 1121, 1124

See LIQUOR LICENSE ACT, 1.

R.S.C. 1906, ch. 152, sec. 136 (Canada
Temperance Act).

See CRIMINAL LAW, 5.

R.S.C. 1906, ch. 152, sec. 150.

See LIQUOR LICENSE ACT, 3.

8 & 9 Edw. VII. ch. 32, sec. 5 (D.)
(Amending Railway Act).

See RAILWAY.

1 Geo. V. ch. 26, sec. 46 (O.) (Trustee
Act).

See WILL, 3.

2 Geo. V. ch. 53, sec. 5 (4) (O.) (Trac-
tion Engines Act).

See HIGHWAY, 4.

R.S.O. 1914, ch. 56, secs. 32, 43 (2)
(Judicature Act).

See INSURANCE, 2.

R.S.O. 1914, ch. 59, secs. 39, 40
(County Courts Act).

See APPEAL.

R.S.O. 1914, ch. 63, secs. 79 (2), 123
(Division Courts Act).

See DIVISION COURTS.

R.S.O. 1914, ch. 75 (Limitations Act).
See EXECUTORS AND ADMINISTRATORS—TITLE TO LAND.

R.S.O. 1914, ch. 75, sec. 5.

See LIMITATION OF ACTIONS, 2.

R.S.O. 1914, ch. 75, sec. 40.

See LIMITATION OF ACTIONS, 1.

R.S.O. 1914, ch. 76, sec. 12 (Evidence
Act).

See EXECUTORS AND ADMINISTRATORS.

R.S.O. 1914, ch. 88, secs. 24, 28 (Police
Magistrates Act).

See LIQUOR LICENSE ACT, 1.

R.S.O. 1914, ch. 90, sec. 4 (Summary
Convictions Act).

See LIQUOR LICENSE ACT, 1.

R.S.O. 1914, ch. 102 (Statute of
Frauds).

See CONTRACT, 3, 5—EXECUTORS AND ADMINISTRATORS — VENDOR AND PURCHASER.

R.S.O. 1914, ch. 112, sec. 6 (2) (Mort-
gages Act).

See MORTGAGE, 3.

R.S.O. 1914, ch. 119 (Devolution of
Estates Act).

See WILL, 3.

R.S.O. 1914, ch. 120, sec. 38 (Wills
Act).

See WILL, 2.

R.S.O. 1914, ch. 124 (Registry Act).

See MECHANICS' LIENS, 1.

R.S.O. 1914, ch. 124, secs. 2 (c), 71.

See MECHANICS' LIENS, 3.

R.S.O. 1914, ch. 126 (Land Titles Act).

See WILL, 3.

R.S.O. 1914, ch. 130, sec. 3 (Rivers and
Streams Act).

See WATER.

R.S.O. 1914, ch. 140, secs. 2 (c), 21
(Mechanics' and Wage-Earners'
Lien Act).

See MECHANICS' LIENS, 1.

R.S.O. 1914, ch. 140, secs. 8 (3), 17,
23.

See MECHANICS' LIENS, 2.

R.S.O. 1914, ch. 140, secs. 14 (2), 21.

See MECHANICS' LIENS, 3.

R.S.O. 1914, ch. 148, secs. 15, 36
(Marriage Act).

See CONSTITUTIONAL LAW, 1.

R.S.O. 1914, ch. 151 (Fatal Accidents
Act).

See NEGLIGENCE, 2.

R.S.O. 1914, ch. 153, sec. 3 (Infants
Act).

See INFANTS, 1.

- R.S.O. 1914, ch. 155, sec. 20 (2) (Landlord and Tenant Act).
See LANDLORD AND TENANT, 1.
- R.S.O. 1914, ch. 155, sec. 38 (1).
See LANDLORD AND TENANT, 2.
- R.S.O. 1914, ch. 164 (Pharmacy Act).
See HUSBAND AND WIFE.
- R.S.O. 1914, ch. 183, sec. 166 (7), (9), (10), (11) (Insurance Act).
See INSURANCE, 4.
- R.S.O. 1914, ch. 183, secs. 169, 171, (3), (5), 178 (1), (2), (7).
See INSURANCE, 3.
- R.S.O. 1914, ch. 183, secs. 171 (3), (5), 177 (4), 178, 179.
See INSURANCE, 2.
- R.S.O. 1914, ch. 183, sec. 172 (1).
See INSURANCE, 1.
- R.S.O. 1914, ch. 192, sec. 162 (1) (Municipal Act).
See MUNICIPAL ELECTIONS.
- R.S.O. 1914, ch. 192, sec. 249.
See CONTRACT, 3.
- R.S.O. 1914, ch. 192, secs. 325, 406 (8).
See MUNICIPAL CORPORATIONS, 2.
- R.S.O. 1914, ch. 1912, sec. 409 (2).
See NUISANCE.
- R.S.O. 1914, ch. 192, sec. 458.
See HIGHWAY, 1.
- R.S.O. 1914, ch. 192, sec. 460.
See HIGHWAY, 2, 3—MUNICIPAL CORPORATIONS, 1.
- R.S.O. 1914, ch. 192, Parts XV., XVI. (Municipal Act).
See MUNICIPAL CORPORATIONS, 3.
- R.S.O. 1914, ch. 204, sec. 4 (Public Utilities Act).
See MUNICIPAL CORPORATIONS, 3.
- R.S.O. 1914, ch. 212, sec. 5 (4) (Tractor Engines Act).
See HIGHWAY, 4.
- R.S.O. 1914, ch. 215, secs. 65, 92, 94 (2), 113 (1) (Liquor License Act).
See LIQUOR LICENSE ACT, 1.
- R.S.O. 1914, ch. 215, sec. 78.
See LIQUOR LICENSE ACT, 3.
- R.S.O. 1914, ch. 215, secs. 106, 126, 128, 129.
See LIQUOR LICENSE ACT, 2.
- R.S.O. 1914, ch. 215, sec. 141.
See LIQUOR LICENSE ACT, 4.
- 5 Geo. V. ch. 22 (O.) (Mortgagors and Purchasers Relief Act).
See MORTGAGE, 1.
- 5 Geo. V. ch. 22, secs. 2, 5 (O.)
See MORTGAGE, 2.
- 5 Geo. V. ch. 39, sec. 33 (O.) (Amending Liquor License Act).
See LIQUOR LICENSE ACT, 4.
- 5 Geo. V. ch. 45 (O.) (Ottawa Roman Catholic Separate Schools).
See CONSTITUTIONAL LAW, 2.
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- STAY OF PROCEEDINGS.**
See TRADING WITH THE ENEMY.
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- STREAM.**
See WATER.
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- STREET.**
See HIGHWAY—RAILWAY.
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- STREET RAILWAY.**
See NEGLIGENCE, 3.
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- SUBSTITUTED AGREEMENT.**
See GUARANTY.
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- SUPREME COURT OF ONTARIO.**
See APPEAL—CERTIORARI—CONSTITUTIONAL LAW.
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- SURVEY.**
See TITLE TO LAND.
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- TAMPERING WITH WITNESSES.**
See LIQUOR LICENSE ACT, 3.
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- TENANTS IN COMMON.**
See LIMITATION OF ACTIONS, 2.
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- TENDER.**
See SALE OF GOODS.
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- THEFT.**
See CRIMINAL LAW, 6.
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- TIMBER.**
See CONTRACT, 4—WATER.
-
- TIME.**
See CONTRACT, 4—HIGHWAY, 2—MUNICIPAL ELECTIONS.

TITLE TO LAND.

Strip between Road Allowance and Lake — Evidence — Survey — Trespasser — Possession — Limitations Act — Erection of Building — Right Acquired to Part of Land Occupied by, only — Easement — Prescription — Way to Building from Lake-shore — Way from Side Road.]—*Held*, upon evidence relating to the original survey of the township of Sarnia in 1829, that the lots in the 9th concession extended to the lake, and that the plaintiff had made out his paper title to the *locus in quo*.—*Held*, also, that the defendant failed to shew a possession of any part of the land of which possession was claimed, except that part of it which was occupied by the original shack which he built, sufficient to extinguish the title of the plaintiff.—*Piper v. Stevenson* (1913), 28 O.L.R. 379, *Natress v. Goodchild* (1914), 6 O.W.N. 156, 482, 24 O.W.R. 184, 859, and *Cowley v. Simpson* (1914), 31 O.L.R. 200, distinguished.—*Held*, also, that the defendant had not established a right by prescription to pass and repass to and from the shack to the lake and over the strip of land lying between the road allowance and the water's edge in order to reach a side road.—*Regina v. Plunkett* (1862), 21 U.C.R. 536, and *Regina v. Ouellette* (1865), 15 U.C.C.P. 260, in regard to the user sufficient to shew dedication, applied. *McLean v. Wilson*, 610.

See EVIDENCE—LIMITATION OF ACTIONS.

TRACTION ENGINES ACT.

See HIGHWAY, 4.

TRADING STAMPS.

See CRIMINAL LAW, 3.

TRADING WITH THE ENEMY.

Action for Money Admittedly Owed—Suspicion that Money Intended to be Paid by Plaintiffs to Alien Enemy — Evidence—Order Staying Proceedings until Termination of War—Reversal on Appeal—Costs.]—The plaintiffs, a company incorporated under the laws of Ontario, sued, as assignees of a company similarly incorporated, to recover the price of goods sold and delivered by the assignor-company to the appellants. The defendants admittedly owed the money sued for:—*Held* (HODGINS, J.A., dissenting), that an order staying all proceedings in the action until the termination of the war should not have been made, because there was no evidence to warrant the conclusion that the money sued for, if recovered from the defendants, would be paid, or that the plaintiffs intended to pay it, to an alien enemy; and that was the only ground upon which the order was supported. If it had been shewn that the plaintiffs were merely agents for, and that the money owing by the defendants was really owed to, a German or Austrian person, firm or corporation, it would have been proper to have stayed the action during the war; but the contrary was shewn. — *Continental Tyre and Rubber Co. (Great Britain) Limited v. Daimler Co.*

Limited, [1915] 1 K.B. 893, applied.—No costs of the application for the order nor of the appeal were allowed to either side.—*Rex v. Kupfer*, [1915] 2 K.B. 321, referred to by the dissenting Judge. *Will P. White Limited v. T. Eaton Co. Limited*, 447.

TRIAL.

See APPEAL.

TRUSTS AND TRUSTEES.

Payments by Trustee out of Trust Fund in Fraud of Trust Agreement between Husband (Trustee) and Wife—Misapplication of Fund in Payment of Debts of Wife—Volunteer—Breaches of Trust—Liability of Wife to Make Good — Account — Interest — Annual Rests.—Where it was proved that there was an agreement between the defendant's husband, the trustee of a fund, and the defendant, that a breach of trust should be committed; and the fraudulent conversion of the debenture which they had in contemplation was ultimately carried out, and the money realised from it was used to discharge a debt for which the defendant was liable, or to repay moneys borrowed by her and her husband to pay for company-shares which belonged to her, though they stood in her husband's name:—*Held*, that the defendant was liable to make good the breach of trust. — In respect of other moneys taken from the trust fund and used to pay debts of the defendant; what was done amounted to a gift to the defendant of the portion of the fund so applied; and the defendant

was, therefore, a volunteer, and was bound by the trust impressed on the money so applied, even if she had no knowledge that the money was trust money, and she was liable to make good to the trust the money taken from it.—In taking the account, the defendant was charged with interest at five per cent. per annum with annual rests; for it was the duty of the trustee to invest the money which he misapplied; and, if he had done so, the investment would have produced five per cent. compound interest.—*Gilroy v. Stephens* (1882), 51 L.J. Ch. 834, followed. *Owen v. Richmond*, [1895] W.N. 29, not followed. *Harrison v. Mathieson*, 347.

See HUSBAND AND WIFE — INSURANCE, 2.

ULTIMATE NEGLIGENCE.

See NEGLIGENCE, 3.

UNCHASTITY.

See LIBEL, 2.

URINAL.

See MUNICIPAL CORPORATIONS, 2.

VENDOR AND PURCHASER.

Agreement for Sale of Land—“Option” in Agreement for Lease—Acceptance—Statute of Frauds—Names of Vendors—Consideration—Mutual Obligations — Period of Option not Specified—Rule against Perpetuities—Revocation of “Option”—Forfeiture—Indefiniteness—Mortgage—Absence of Particularity—Election to Pay in

Cash—Action for Specific Performance—Failure to Register Agreement — Subsequent Bonâ Fide Purchasers without Notice — Addition as Parties—Damages for Breach of Contract—Remedy against Purchasers—Measure of Damages—Assessment.]—By an informal memorandum in writing, the defendant S. and his wife leased to the plaintiff a house and lot for a term of three years, adding: "We hereby agree to give to" the plaintiff (naming him), "an option to purchase said property," at a price named. No time was set for the exercise of the "option," and the vendors' names did not appear in the body of the memorandum; their signatures were at the end. The plaintiff sued for specific performance, alleging that he had accepted the offer or "option:"—*Held*, that the memorandum was sufficient to satisfy the Statute of Frauds, although the vendors' names did not appear in the body of the writing.—That, although the plaintiff was not entitled to the equitable relief of specific performance, because he failed to register his agreement, and so permitted *bonâ fide* purchasers for value without notice of his rights to acquire the property, he was yet entitled at law to recover damages for breach of contract, but only against his vendors—not against the subsequent purchasers, who had been added as defendants, and who were not alleged to have induced the vendor to break his contract.—*McIntyre v. Stockdale* (1912), 27 O.L.R. 460, commented on.—*Bagot Pneumatic Tyre*

Co. v. Clipper Pneumatic Tyre Co., [1902] 1 Ch. 146, followed.—That the measure of damages was the difference between the price agreed on and the actual value of the land at the time when the conveyance should have been made; and the damages awarded by the trial Judge were reduced. *Bennett v. Stodgell*, 45.

VOLUNTEER.

See TRUSTS AND TRUSTEES.

WAIVER.

See LIQUOR LICENSE ACT, 1—
SALE OF GOODS.

WAR.

See TRADING WITH THE ENEMY.

WARRANT OF COMMITMENT.

See LIQUOR LICENSE ACT, 1.

WARRANTY.

See LANDLORD AND TENANT, 3.

WATER.

Flotable Stream—Improvements Made by Crown Timber Licensees —Rivers and Streams Act, R.S.O. 1914, ch. 130, sec. 3—Deprivation of Water — Freshet-water.]—The judgment of *Boyd, C.*, 34 O.L.R. 609, was affirmed (*MAGEE, J.A.*, hesitating.). *Hunt v. Beck*, 333.

See MUNICIPAL CORPORATIONS
3—PARTIES, 2.

WAY.

See HIGHWAY — TITLE TO
LAND.

WILL.

1. *Construction — Devise — “Issues” — “In Fee” — Life Estate — Remainder — Rule in Shelley’s Case.*]—The testator devised land unto his two daughters M. and J., “to have and to hold to the use of them the said M. and J. for and during the terms of their natural lives as tenants in common and after their decease the undivided share of each to the use of their respective issues in fee so that the child or children of each will take his her or their mother’s share but in case the said J. should die without issue then I give and devise her share thereof to the children of the said M. alone share and share alike:”—*Held*, that the words “in fee” are not necessarily equivalent to “in fee simple;” but the testator had interpreted his own language and shewn that by “issues,” in the phrase “respective issues in fee,” he meant “children;” and, therefore, M. took only a life estate in the land.—*King v. Evans* (1895), 24 S.C.R. 356, and *Van Grutten v. Foxwell*, [1897] A.C. 658, distinguished. *Re Taylor*, 116.

2. *Construction — Payment of Mortgage-debts—Direction to Pay out of Fund Arising from Sale of Property, Real and Personal—Wills Act, R.S.O. 1914, ch. 120, sec. 38—Primary Liability of Real Estate Charged—“Contrary or other Intention”—Creation of “Mixed Fund”—Ratable Contribution—Life Estate.*]—The testator (dying in 1911) by his will devised and bequeathed the

whole of his estate, which comprised both real and personal property, to trustees, upon trust, as soon as convenient after his death, to convert into money such parts of his estate as should not consist of money, “except as is herein otherwise provided for;” and then directed the trustees to pay his debts and funeral and testamentary expenses “and any charge by way of mortgage that may be against my property at the time of my death:”—*Held*, that, the trustees being directed to pay the testator’s debts, including his mortgage-debts, and the only fund available to them for that purpose being the proceeds of the sale of the property which they were directed to convert into money, the direction to pay was a direction to pay out of that fund; and the testator had by his will signified the “contrary or other intention” necessary to displace what otherwise would have been the effect of sec. 38 of the Wills Act, R.S.O. 1914, ch. 120, viz., that the mortgaged real estate should be primarily liable.—*Henwell v. Whitaker* (1827), 3 Russ. 343, followed.—The direction to convert as soon as convenient was subject to an exception—“except as herein is otherwise provided for;” but that referred to a subsequent direction that land devised to the testator’s wife for life should not be sold in her lifetime without her consent.—The fund which the testator had created was a mixed fund; and the burden of the charge must be contributed to ratably by the

personalty and realty from which the fund was to be derived, i.e., the whole of the real and personal estate except the life estate devised to the wife.—The rule stated in Jarman on Wills, 6th ed., p. 2033, as to the creation and disposition of a mixed fund, adopted. *Re Le Brun*, 135.

3. *Executor—Power of Sale—Residuary Clause—Maintenance of "Residence"—Rule against Perpetuities—Legacy Charged on Estate—Trustee Act, R.S.O. 1897, ch. 129, secs. 16, 19—1 Geo. V. ch. 26, sec. 46—Devolution of Estates Act—Contract of Sale—Res Judicata—Land Titles Act.*]

—In this action, one of the sons of the testator whose will was in question in several previous actions, such as *Kennedy v. Kennedy* (1911), 24 O.L.R. 183, sought to set aside a sale of land by J., the executor, to a company, contending that there was no power of sale which J. could rightly exercise:—*Held*, that the testator, having charged a \$400 legacy upon his estate, and having devised his estate to his executor, gave to the executor a power of sale, quite apart from the residuary clause, and this power might be exercised without the purchaser being put on inquiry to ascertain if it was being duly exercised: *Trustee Act, R.S.O. 1897, ch. 129, secs. 16, 19.*—(2) That, while the executor might have, by virtue of the Devolution of Estates Act, an additional power to sell, that power in no way derogated from the powers expressly given by the will itself or by any statutory

implication from the words used in the will: 2 Edw. VII. ch. 17, sec. 1. The provision of the new Trustee Act, 1 Geo. V. ch. 26, sec. 46, making the provision found in sec. 16 of the earlier Act "subject to the provisions of the Devolution of Estates Act," does not change the result; for the Devolution of Estates Act expressly preserves the express and implied power of sale found in the will; and the right of the purchaser is based upon the contract, which was made before the passing of the new Trustee Act.—(3) That the power expressly conferred by the will did not fall merely by the direction given to the executors to use the fund for a purpose which offended against the rule as to perpetuities—the executor held the fund to be distributed among those who would take upon an intestacy.—(4) That the claim of the plaintiff was *res judicata* in former litigation between the parties, in which the sale to the company was upheld, and the power to sell was necessarily in issue.—(5) That, as to the land brought under the Land Titles Act, the registration had been sufficient to confer an absolute title upon the purchaser.—(6) That the action should be dismissed with costs. *Kennedy v. Suydam*, 512.

See INSURANCE, 2, 3.

WITNESSES.

See CRIMINAL LAW, 4—LIQUOR LICENSE ACT, 3.

WORDS.

- “*Absolute Discretion.*”] — See MORTGAGE, 2.
 “*Contrary or other Intention.*”] — See WILL, 2.
 “*Deviation.*”]—See HIGHWAY, 1.
 “*Fair Comment.*”]—See LIBEL, 1.
 “*In Fec.*”]—See WILL, 1.
 “*Inspector or any Officer of the Crown.*”]—See LIQUOR LICENSE ACT, 2.
 “*Laid out and Opened.*”]—See HIGHWAY, 1.
 “*Marshalling.*”] — See MORTGAGE, 3.
 “*Mixed Fund.*”]—See WILL, 2.
 “*On any Prosecution.*”]—See LIQUOR LICENSE ACT, 3.
 “*Option.*”]—See VENDOR AND PURCHASER.
 “*Owner.*”] — See MECHANICS’ LIENS, 1.
 “*Premium.*”]—See CRIMINAL LAW, 3.
 “*Public Place.*”]—See LIQUOR LICENSE ACT, 4.
 “*Residence.*”]—See WILL, 3.
 “*Right or Privilege with Respect to Denominational Schools.*”]—See CONSTITUTIONAL LAW, 2.
 “*Trading Stamps.*”] — See CRIMINAL LAW, 3.
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- WRIT OF SUMMONS.
 See PRACTICE.

